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MEDICAL JURISPRUDENCE FORENSIC MEDICINE AND TOXICOLOGY

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INTRODUCTION.

The terms Forensic Medicine, Legal Medicine, and Medical Jurisprudence have heretofore been used interchangeably to apply to those branches of state medicine and of jurisprudence which have to deal with the applications of medical knowledge to the elucidation of questions of fact in courts of law, and with the legal regulation of the practice of medicine.

Medico-legal science therefore includes all subjects concerning which members of the legal and medical professions may seek information of one another, each acting in his professional capacity. It consists of two distinct branches: that treating of medical law, to which the designation of Medical Jurisprudence properly applies; and that relating to the application of medical, surgical, or obstetrical knowledge to the purposes of legal trials, Forensic Medicine.[1]

The term State Medicine, which is sometimes erroneously used as synonymous with forensic medicine, properly applies to a more extended field of medical inquiry; *i.e.*, to all applications of medical knowledge to the public welfare. State medicine, therefore, while excluding medical jurisprudence, includes, besides forensic medicine, public hygiene, medical ethics, medical education, and military and naval medicine.

Toxicology, the science of poisons, may be divided into

[1] The distinction made in the text and in the title of this work is not new. Zacchias, early in the eighteenth century, recognized it in the two prefaces to his book, one to the "lector medicus," the other to the "lector legumperitus" ("Quæst. Med. Leg.," Ed. Venet., 1727, fol.). In a note to the introduction of the "Medical Jurisprudence" of Dr. Paris and Mr. Fonblanque (the first work produced by joint authorship of a physician and a lawyer, in 1823) is the following (p. i.): "Some authors have objected to the term *Medical Jurisprudence*, as implying a knowledge of the laws relating to medical topics, rather than an acquaintance with the medical science necessary for the elucidation of legal subjects. As it is our peculiar object to unite the sciences and to show their mutual relevance, the title becomes most applicable to this, although it may have been improperly affixed to former works." The title of one of two existing French works in whose authorship a lawyer is associated is: "Traité de Médecine légale, de Jurisprudence médicale et de Toxicologie," par Le Grand du Saulle, Geo. Berryer et Gab. Pouchet, 2d ed., 8vo, Paris, 1886.

medical toxicology, whose object is the prevention or cure of all forms of poisoning, and *forensic toxicology*, whose aim is the detection of criminal poisoning. In its last-named relation toxicology differs from forensic medicine in one important particular. In all cases other than those of poisoning in which questions involving medical knowledge arise, the answers are entirely within the functions of the physician, the surgeon, or the obstetrician, but the problems of forensic toxicology require for their solution the further aid of the chemist and the pharmacologist.

Forensic medicine is an applied science, partly legal, partly medical, calling for information and investigation in widely divergent lines, and becoming more minutely ramified with the progressive advances in medical knowledge and in those sciences of which medicine is itself an application. Its development has been dependent partly upon the slow though progressive tendency of medicine from the condition of an empirical art toward that of an exact science, and partly upon the more rapid and more advanced development of criminal jurisprudence. Medical jurisprudence had reached a high development during the early history of the Roman Empire, and at a period long anterior to the first recognition of forensic medicine.

Although the literature of modern medico-legal science is very largely written from the medical point of view and by physicians, its earlier history is to be found in fragmentary form, partly in medical literature, but principally in the writings of historians, in the earlier criminal codes, and in the early records of legal proceedings.

In the earliest historical periods the functions now exercised by the priest, the lawyer, and the physician were performed by the same person, who, presumably, made use of what medical knowledge he possessed in the exercise of his legal functions. Among the Egyptians at a very early period it is certain that medical questions of fact were considered in legal proceedings, and that the practice of medicine was subject to legal regulation. According to Diodorus,[1] "when a pregnant woman was condemned to death, the sentence was not executed until after she was delivered." The same author tells us[2] that "the physicians

[1] "Bibl. Hist.," I., ii., 77; Miot's transl., Paris, 1834, i., 157.

[2] *L. c.*, I., ii., 82; transl., i., 165.

regulated the treatment of the sick according to written precepts, collected and transmitted by the most celebrated of their predecessors. If, in following exactly these precepts which are contained in the sacred books, they did not succeed in curing the sick, they could not be reproached, nor could they be prosecuted at law; but if they have proceeded contrary to the text of the books, they are tried, and may be condemned to death, the legislator supposing that but few persons will ever be found capable of improving a curative method preserved during so long a succession of years and adopted by the most expert masters of the art." With the system of legal trial in use among the Egyptians [1] it is difficult to imagine that the question of the existence of pregnancy in the one case, or of malpractice in the other, would not be the subject of contest, and, if contested, determined without the testimony of obstetricians or of physicians.[2]

Medical knowledge among the Hindoos was further advanced than among the Egyptians. In the Rig Veda (about 1500 B.C.) occur a few medical references, among which is the statement that the duration of pregnancy is ten (lunar) months.

The earliest purely medical Sanskrit texts are the Ayur Vedas of Châraka and Sûsruta, which were probably written about 600 B.C., but which are undoubtedly compilations of information which had been handed down during many centuries before that time. In each of these is a section devoted to poisons and their antidotes (Kalpa), in which it is written that a knowledge of poisons and antidotes is necessary to the physician "because the enemies of the Rajah, bad women, and ungrateful servants sometimes mix poison with the food." Full directions are also given for the recognition of a person who gives poison, and to differentiate the poisons themselves, whose number, from all the kingdoms of nature, is legion. The age at which women may marry is fixed at twelve years, while men

[1] *L. c.*, I., ii., 75, 76; transl., i., 152.

[2] The "Papyros Ebers," in the University of Leipzig, the most ancient medical text known, was written about 1550 B.C., and is probably one of the books referred to by Diodorus. It contains no statement bearing upon our subject. It is, however, simply a collection of descriptions of remedies, and their uses, including the incantations to be used with them. (See "Papyros Ebers," H. Joachim, Berlin, 1890.) The same is true of the Berlin and Leyden papyri. The Bibl. Nat. (Tf. 2) possesses a Chinese manuscript on legal medicine. The catalogue does not, however, state to what period it belongs.

may not marry before twenty-five. The duration of pregnancy is given as between nine and twelve lunar months, the average being ten. The practice of medicine is restricted to certain castes, and requires the sanction of the Rajah, and the method of education of medical students is prescribed.[1]

It is singular that the Greeks were apparently destitute of any knowledge of legal medicine. Although medicine and jurisprudence were highly developed among them, allusions to any connection between the two are of very rare occurrence and uncertain.

The Hippocratic writings (*ca.* 420 B.C.) contain many facts which are of medico-legal interest: the possibility of superfœtation was recognized;[2] the average duration of pregnancy was known, and the viability of children born before term was discussed,[3] the relative fatality of wounds affecting different parts of the body was considered,[4] and the Hippocratic oath makes the physician swear that he "will not administer or advise the use of poison, nor contribute to an abortion." The position of the physician in Greek communities was an exalted one. No slave or woman might be taught medicine,[5] although later free-born women were permitted to practise in their native places. Homer also refers to physicians as men of learning and of distinction.[6] The Greek physician was therefore in a position, both from his information and from his standing in the community, to aid in the administration of justice.

The Greeks were also extremely litigious and possessed a code of criminal procedure which was elaborate, and in many respects resembled those now in use in England and the United States.[7] The writings of the Greek orators, Demosthenes, Æschines, Lysias, Antiphon, Isocrates, etc., which have come down to us substantiate the claim of Ælian that "to Athens mankind

[1] For an account of early Indian medicine, see Th. A. Wise, "Review of the Hist. of Med.," Lond., 1867, i., 272 *et passim;* "Hindu System of Medicine," 1845, by the same author; Haeser, "Lehrb. d. Gesch. d. Med.," 3. ed., i., 5–40.

[2] Hippocr.: "De Superfœtatione," ed. Littré, viii., 472.

[3] Hippocr.: "De Septimestri partu;" *Ibid.*, "De Octimestri partu," ed. Littré, viii., 432, 436, 452.

[4] "Aphorismi," vi., 18, 24; "De Morbis," ed. Littré, vi., 144.

[5] Petit, S.: "Leges Atticæ," Lugd. Bat., 1742, lib. iii., tit. 8.

[6] "Od.," iv., 229; xvii., 384.

[7] For an excellent account of Attic criminal procedure, see Kennedy, C. R.: "Demosthenes' Orations," ed. Bohn, iii., 326–372.

is indebted for the olive, the fig, and the administration of justice." [1]

The writings of the Greek physicians contain no reference to any legal application of their knowledge, and certain passages in the writings of the orators seem to indicate that, while a physician was called to inspect and treat a wounded person, the testimony as to the patient's condition was given in court by others.

Thus in the case against Euergos and Mnesibulus, in which an old woman had died some days after an assault, Demosthenes [2] states that he notified the accused to bring a surgeon and cure the woman; but that as they did not do so, he himself brought his own surgeon and showed him her condition in the presence of witnesses. Upon hearing from the surgeon that the woman was in a hopeless condition, he again explained her state to the accused and required them to find medical aid. Finally, on the sixth day after the assault the woman died. He further asserts that these statements would be proved by the depositions.[3]

The third Tetralogy of Antiphon [4] (B.C. 480) relates to a case in which the defence was essentially the same as that which was the subject of a vast amount of medical expert testimony in a celebrated trial for murder in New York not many years ago. A person wounds another, who dies some days afterward. The assailant is accused of murder and sets up the defence that the deceased perished, not from the wounds inflicted, but in consequence of unskilful treatment by the physicians.

In neither of these cases is any mention made of physicians having been called upon for testimony; indeed, the statements would lead to the inference that they were not. In another case in which a poor and sick citizen is accused of malingering to obtain the customary pecuniary aid from the State, Lysias [5] summons no medical evidence but relies entirely upon a statement of his client's case.[6]

[1] "Var. Hist.," iii., 38.

[2] Kennedy's transl., ed. Bohn, v., 95.

[3] What the contents of these depositions were and by whom made is unknown, as the papers referred to by the orator are not given. In the Attic courts the testimony was taken at a preliminary trial, and referred to at the trial by the orator.

[4] "Oratores Attici," C. Müller, Paris, 1877, i., 20.

[5] "Oratores Attici," C. Müller, ed. Didot, Paris, 1877, i., 200–203.

[6] In a doubtful fragment of Lysias the expression "as physicians and

Medical legislation was not more advanced during the ascendancy of the Roman Empire, although medical science was greatly developed, principally by the labors of Celsus, and of Galen and other Greek physicians. A few cases are mentioned by the historians which would seem to indicate a closer connection between law and medicine than had existed among the Greeks, but they refer rather to the custom of exposing the bodies of those who had died by violent means to public view, in order that any one might express his opinion as to the cause of death, than to any appeal to medical science in the administration of justice. Thus Suetonius[1] says that the physician Antistius examined the dead body of Julius Cæsar (B.C. 44), and declared that of all the wounds only that received in the breast was mortal.

Pliny[2] cites an early instance of contested interpretation of post-mortem appearances in the case of Germanicus, who died A.D. 19, by the action of poison, said the enemies of Piso, because the heart did not burn. The friends of Piso, while admitting the fact of non-consumption, attributed it to the deceased having had heart disease. The same author[3] quotes Masurius as having declared a child born after thirteen (lunar) months to be legitimate, in an action for the possession of property, on the ground that no certain period of gestation was fixed. The Emperor Hadrian (A.D. 117–138), according to Gellius, sought medical information in a similar case, and decreed the legitimacy of a child born in the eleventh (lunar) month, "after having considered the opinions of ancient philosophers and physicians."[4]

Although the Justinian collections, the "Codex" (A.D. 529), the "Institutes" (A.D. 533), the "Digests," or "Pandects" (A.D. 534), and the "Novels" (A.D. 535–564), prepared by the best legal talent of the age, under the direction of Tribonian, do not provide for the summoning of physicians as witnesses; they contain an expression which indicates that at that time the true

midwives declare" (*ὥσπερ οἱ ἰατροὶ καὶ αἱ μαῖαι ἀπερηναντο*) is used in connection with the question whether a fœtus has life and may be murdered. *Cf.* "Orat. Attici," Müller and Hunziker, Paris, Didot, 1858, ii., 257.

[1] "Jul. Cæs.," 82.

[2] "Hist. Nat.," xi., 71.

[3] "Hist. Nat.," vii., 4.

[4] A. Gellius: "Noct. Att.," l. 3, c. 16: "requisitis veterum philosophorum et medicorum sententiis." The word "*veterum*" seems to indicate that the emperor consulted books, not living physicians.

function of the medical expert was more correctly appreciated than it is to-day. His function was stated to be judicial rather than that of a witness.[1] There is also a provision that in cases of contested pregnancy, midwives (who were considered as belonging to the medical profession) should, after examination of the woman, determine whether or no pregnancy exist, and that their determination should be final. The practice of medicine, surgery, and midwifery was regulated. Those desiring to practise must have been found competent by an examination. The number of physicians in each town was limited. They were divided into classes, and were subject to the government of the Archiatri. Penalties were imposed upon those guilty of malpractice or of poisoning. The Justinian enactments contain abundant internal evidence of having been framed in the light of medical knowledge. They contain provisions relating to sterility and impotence, rape, disputed pregnancy, legitimacy, diseased mental conditions, presumption of survivorship, poisoning, etc., which indicate that the medical knowledge of the time was fully utilized in their construction.[2]

The Germanic peoples at about the same period possessed codes in which traces of a rudimentary medical jurisprudence existed. The most ancient of these was the Salic law (A.D. 422), in which the penalties to be paid for wounds of different kinds are fixed. The Ripuarian law, of somewhat later date, takes cognizance of the crime of poisoning. The laws of the Bavarians, Burgundians, Frisians, Thuringians, and Visigoths contain practically nothing of medico-legal interest. The Lex Alamannorum has numerous provisions relating to wounds, and expressly provides that the gravity of the injury shall be determined by a physician.[3]

During the period of about a thousand years, intervening between the Justinian and Caroline (*vide infra*) codes, the advancement of medicine and jurisprudence suffered almost complete arrest. The guilt or innocence of an accused person

[1] "Medici non sunt proprie testes, sed majus est judicium quam testimonium."

[2] For accounts of the medico-legal provisions of the Justinian enactments, see: G. A. v. d. Pfordten. "Beiträge z. Gesch. d. ger. Med. aus d. Justin. Rechtssam.," Würzburg, 1838; M. F. Eller, Bull. Med.-Leg. Soc. N. Y., 1879, i., 226–237; and Friedreich, Blt. f. ger. Anthr., Nürnberg, 1850, I., iii., 1–64; 1862, xiii., 188–215.

[3] See Mende: "Handb. d. ger. Med.," Leipzig, 1819, i., 83–87.

was determined rather by his own confession under torture, or by "the judgment of God" as shown by ordeal or by judicial combat, than by testimony either expert or of fact.

Even during the night of the Middle Ages, instances are recorded in which the opinions of physicians were sought to determine questions of fact in judicial proceedings.

In the duchy of Normandy, in 1207–45, the laws provided for the examination of those claiming to be sick (to evade military service or appeal to judicial duel), of persons killed, and of women.[1]

In a decretal of Innocent III., in 1209, the question whether a certain wound was mortal was determined by physicians.[2]

There is extant in the statutes of the city of Bologna, under date of 1249, an entry to the effect that Hugo di Lucca had been assigned the duty, when called upon by the podesta, and after having been sworn, to furnish a true report in legal cases.[3]

In the kingdom of Jerusalem (*ca.* 1250) a person claiming exemption from trial by battle because of sickness or of wounds was visited by a physician (*fisicien ou miége*) and a surgeon (*sérorgien*), who examined him and made oath as to his condition.[4]

Sworn surgeons to the king are also mentioned in letters patent of Philippe le Hardi in 1278, of Philippe le Bel in 1311, and of Jean II. in 1352.[5] That of Philippe le Bel refers to Jean Pitardi as one of "his well-beloved sworn surgeons in his Chastelet of Paris," whose functions are partly indicated by the extracts from the registers given below.

The registers of the Châtelet at Paris from 1389 to 1392 record several instances in which medical aid was rendered in judicial proceedings. Under date of March 22d, 1389–90, "Maître Jehan Le Conte, sworn surgeon to the king our sire," reports to Maître Jehan Truquam, lieutenant to the provost, that "upon that day in the morning one Rotisseur had gone

[1] "Etablissements et Coûtumes, Assises et Arrêts de l'Echiquier de Normandie au xiii. Siècle," A. J. Marnier, Par., 1839: "veue d'homme en langueur, veue de méfaits, veue d'homme occis et veue de femme despucelée."

[2] "Ut peritorum judicio medicorum talis percussio asseveretur non fuisse letalis," Mende, "Handb. d. ger. Med.," i., 91.

[3] Hensschel, in "Janus," Breslau, 1847, ii., 135.

[4] "Assises de Jérusalem," Beugnot, Paris, 1841–43, quoted by Ortolan, *l.c.*, *infra*.

[5] Ortolan: "Débuts d. l. Méd. lég.," Ann. d'Hyg., Par., 1872, 2 s., xxxviii., 361.

from life unto death in consequence of the wounds which he had received on the Monday evening preceding."[1] Under date of July 22d, 1390, is an account of the examination of one Jehan le Porchier, accused of intent to poison the king (Charles VI.), in which there is reference to a very early instance of toxicological expert evidence. In the wallet of the accused certain herbs were found. The account proceeds: "Richart de Bules, herbalist, was summoned, to him the above-mentioned herbs were shown, and he was commanded that he should examine them and consider well and duly, reporting the truth of what he should find. The said Richart, after having examined them with great diligence, reported that in the box in which these herbs were he had found six leaves, namely: one leaf of *jacia nigra*, and one of round plantain, called in Latin *plantago minor*, and four of sow-thistle (*lasseron*), called in Latin *rosti poterugni*, and says that the leaf of *jatria nigra* is poisonous, but that in the others there is no poison known to the deponent."[2] On August 12th, 1390, "Jehan Le Conte and Jehan Le Grant, sworn surgeons of our sire the king," are present at the torture of a prisoner, but for what purpose does not appear. In another case the same Jehan Le Conte testified that a wound in the head of a deceased person was made with an axe.[3] At a later period in Italy, the infliction of "the question" took place under medical supervision. Zacchias devotes a chapter, *De Tormentis et Pœnis*,[4] to the consideration of the different methods of torture, the degrees of pain and danger attending each, and the conditions of age, sex, and health which render its application inadmissible.[5]

During this period, as indeed from the earliest times, the practice of medicine was regulated by law. Thus a law of King Roger of Sicily (1129–54) punished those who practised medicine without authority with imprisonment and confiscation of goods; and an edict of Frederick II. (1215–46) imposed like penalties upon those who presumed to practise except after graduation at the school of Salernum.[6]

[1] "Registre Criminel du Châtelet de Paris," Par., 1861, i., 255.

[2] *Ibid.*, i., 313. The variants *jacia* and *jatria* occur in the original.

[3] *Ibid.*, i., 375, 409.

[4] "Quæst. Medico-legales," t. ii., lib. vi., tit. ii.; vol. ii., pp. 33–49, ed. Venet., fol., 1737.

[5] See also "Reg. Crim. Chât. de Paris," i., 204, ii., 429; Desmaze: "Hist. Méd. Lég.," 11–20, 33–41.

[6] Isensee: "Gesch. d. Med.," i., 216.

Medico-legal science was formed in the middle of the sixteenth century by a simultaneous awakening of jurists and physicians to the importance of the subject.

It was in Germany that expert medical testimony was first legally recognized. In 1507, George, Bishop of Bamberg, proclaimed a criminal code in his domains. This was subsequently adopted by other German states, and finally was the model upon which the *Caroline Code*, the first general criminal code applying to the whole empire, was framed and proclaimed at the Diet of Ratisbon in 1532.[1]

These codes, particularly the Caroline, distinctly provide for utilizing the testimony of physicians. Wounds are to be examined by surgeons who are "to be used as witnesses;"[2] and in case of death one or more surgeons are to "examine the dead body carefully before burial."[3] They also contain provisions for the examination of women in cases of contested delivery, or suspected infanticide;[4] for the regulation of the sale of poisons;[5] for the detection and punishment of malpractice;[6] and for examination into the mental condition in cases of suicide and of crime.[7]

An early work on the practice of criminal law, based on the Caroline Code, was published by the Flemish jurist, Josse de Damhouder, in 1554. It contains a chapter treating of the lethality of wounds, which should be determined by expert physicians and surgeons,[8] and describes the course which is to be pursued in the judicial examination of dead bodies. This is probably the earliest printed book (other than the laws themselves) containing reference to medico-legal examinations,[9] and antedates the writings of physicians upon the subject.

Although it was only in 1670 that the Ordinances of Louis XIV. gave to France a uniform criminal code, medico-legal reports were made by physicians and surgeons to the courts

[1] "Constitutio criminalis Carolina." The first edition was printed at Mayence, 1533, fol., by J. Schöffer. See also Kopp, "Jahrb. d. Staatsarznk.," Frankf., 1808, i., 183.

[2] "Con. cr. Car.," art. 147.

[3] *Ibid.*, art. 149.

[4] *Ibid.*, arts. 35, 36, 131, 133; "Bambergische Halssgerichts-Ordenung," Bamb., 1507, art. 44.

[5] "Con. cr. Car.," art. 37.

[6] *Ibid.*, art. 134.

[7] *Ibid.*, arts. 135, 179, 219.

[8] "Non per quoslibet, nec per insipidos et imperitos, sed tantum per peritos ac doctos medicos aut chirurgos," p. 245.

[9] "Praxis Rerum Criminalium," Antw., 1554 (the dedicatory epistle is dated 1551), pp. 245–252, 223–228.

more than a century before. Indeed, the earliest medico-legal work written by a physician[1] is the 27th book of the Œuvres d'Ambroise Paré, first printed in 1575, in which he directs the forms in which judicial reports shall be made in various medico-legal cases.[2] During the remainder of the sixteenth century France produced but three treatises on medico-legal subjects.[3] One of these, written by the jurist A. Hotman, distinctly mentions the employment of physicians to determine questions of fact.

In Italy works on medical jurisprudence were published at the close of the sixteenth and beginning of the seventeenth century. The earliest of these was a chapter of Codronchius, treating of the "method of testifying in medical cases," in 1597.[4] At about the same time, but certainly later, appeared the work of Fortunatus Fidelis, to whom the honor of being the first writer on medical jurisprudence is given by many.[5]

The great work of Paulus Zacchias, physician to Pope Innocent X., was first printed at Rome, 1621–35. This medico-legal classic contains in the first two volumes the "*Quæstiones*" and in the third the decisions of the Roman Rota. It treats of

[1] Wildberg, "Bibl. Med.-for.," Berl., 1819, Nos. 553, 554, 1,124, 1,125, 1,126, 1,304, 1,835, 1,836, 2,342, cites nine works earlier than 1575. These are, however, monographs on the period of gestation, witchcraft, fasting girls, drunkenness, and wounds of the head.

Works on toxicology were written at a much earlier date: the Θηριακά and Αλεξιφάρμακα, of Nicander, *ca.* B.C. 135; the περὶ δηλητηρίων φαρμάκων, of Dioscorides, *ca.* A.D. 50; the treatises, "De Venenis," of Petrus de Abbano (*ca.* A.D. 1250), first printed Mantua, 1472; of Arnoldus da Villanova (*ca.* A.D. 1300), first printed (*sine loc. et an.*) *ca.* 1470; of Santes de Ardoynis, Venice, 1492, and of F. Ponzetti, Venice, 1492, are among the earliest. Works on toxicology are not considered in this Introduction, the historical sketch of that science being reserved for a later volume.

[2] Ed. Malgaigne, 1840, t. iii., l. xxvii., pp. 651–658; ed. princ., Paris, 1575, fol., pp. 931–944. On the title-page of an earlier work, printed in 1562, Paré is referred to as "chirurgien ordinaire du Roi, et Juré à Paris." Ploucquet, "Lib. Med. dig.," Tüb., 1809, iv., 349, mentions a monograph by "Tygeon, Th.," printed at Lyons, 1575.

[3] S. Pineau: "De notis Integritatis et Corruptionis Virginum," Paris, 1598; A. Hotman: "De la Dissolution du Mariage par l'Impuissance," etc., Paris, 1581; de la Corde, "Ergo Virgo . . . lac in mammis habere potest," Paris, 1580. Wildberg, *l. c.*, Nos. 555, 1,308, 1,309, are not properly medico-legal.

[4] In his "De Vitiis Vocis," etc., Frankf., 1597. He had previously published a treatise, "De morbis veneficis ac veneficiis," Venet., 1595.

[5] "De relationibus medicorum . . . in quibus ea omnia quæ in forensibus ac publicis causis medici referre solent," etc., Panormi, 1602. Mongitore, "Bibl. Sic.," Panormi, 1707–14, i., 199, mentions an edition of 1598, Pan., under the title: "Bissus [Birrus?], sive medicorum patrocinium," etc.

every branch of medico-legal science, and discusses physiological questions of legal interest, besides dealing with questions such as the infliction of torture and miracles.[1]

Although the "Quæstiones Medico-legales" of Zacchias was the first systematic work upon medical jurisprudence, his countrymen in succeeding centuries have contributed but little to this science. It is only during the latter part of the present century that Italians have again become prominent in medico-legal literature.

In France legal medicine progressed but little from the time of Paré to the latter part of the eighteenth century. Several treatises appeared, being chiefly upon legitimacy and kindred subjects,[2] with a few treating of reports, signs of death, etc.[3]

Toward the end of the eighteenth century the labors of Louis, Petit, Chaussier, and Fodéré elevated legal medicine to the rank of a science. The investigations of Louis (Ant. L.) were numerous and important in this as in other subjects,[4] and the "*causes célèbres*" contain reports of many trials in which he threw light upon doubtful medical questions.[5] Antoine Petit, a contemporary of Louis, contributed an extensive work on the duration of pregnancy as affecting legitimacy.[6]

Somewhat later Fr. B. Chaussier, between 1785 and 1828, published at Dijon a number of treatises on infanticide, viability, surgical malpractice, etc.[7] Fodéré, a Savoyard, was the first to publish a systematic treatise on medical jurisprudence in France, which was first printed in 1798 and in a much en-

[1] "Quæstiones Medico-legales," Rome, 1612–35, 3 t., fol. See also Kerschensteiner: Friedr. Bl. f. ger. Med., etc., Nürnb., 1884, xxxv., 401–410.

[2] Wildberg, "Bibl. Med.-for.," gives the titles of thirty-four treatises on legitimacy, impotence, sterility, signs of virginity, etc., published in France during this period.

[3] On reports: Réné Gendri, 1650; Nicolas de Blegny, 1684; J. Devaux, 1693; Prevot, 1753; H. M. Maret, 1757. On signs of death: P. E. Dionis, 1718; J. B. Winslow, 1740; S. J. Bruhier, 1745.

[4] On the signs of death, 1752; on the distinction between suicide and murder by hanging, 1763; on the duration of pregnancy, 1764, etc. These and other articles on drowning, etc., are collected in his "Œuvres diverses de Chirurgie," 2 vols., Par., 1788.

[5] Cases of Monbailly, Syrven, Calas, Cassaigneux, Baronet, etc.

[6] "Recueil de pièces relatives à la question des naissances tardives," Amst. and Par., 1766, 2 vols.

[7] "Consult. Méd.-lég. s. u. Accus. d'Infanticide," 1785; "Obs. Chir.-lég.," 1790; "Méd.-lég.," 1809; "Consult. et Rapp. sur diverses obj. d. Méd.-lég.," 1824; "Mém. méd.-lég. s. l. Viabilité," 1826; "Consult. Méd.-lég. s. u. cas d'amp. d. l. Cuisse," 1828.

larged form in 1813.[1] This last edition is an exhaustive treatise upon all branches of legal medicine and public hygiene, and won for its author the appointment as Professor of Forensic Medicine in the University of Strassburg.

At about the same period appeared the works of Mahon[2] and of Belloc,[3] both of which went through three editions in ten years, and those of Biessy.[4]

The most industrious and original of French professors of legal medicine was Orfila. A native of Minorca, he graduated in medicine at Paris in 1811, and devoting himself to chemical and toxicological investigations, published the first edition of his "Traité des Poisons" in 1814. This work, which may be regarded as the foundation of experimental and forensic toxicology, went through five editions to 1852, and was translated into several foreign languages. The first edition of his "Leçons de Médecine légale" appeared in 1821, and the fourth in 1848. Besides these Orfila published a work on the treatment of asphyxia and a great number of papers on medico-legal subjects, principally in the *Annales d'Hygiène*, of which he was one of the founders with Andral, Esquirol, Leuret, and Devergie. Orfila occupied the chair of chemistry and medical jurisprudence in the University of Paris for upward of thirty years, and was employed as expert in innumerable cases before the courts.

Contemporaneous with Orfila, and almost as prominent, was Devergie, the first edition of whose "Médecine légale," in three volumes, appeared in 1836, and the third in 1852.

In 1820 the first edition of the Manual of Briand and Brosson was published. This work, the tenth edition of which was published in 1879, is the first in which a jurist was associated with a physician in the authorship,[5] and is one of five of which one of the authors is a lawyer.[6]

[1] "Les Lois éclairées par les Sciences physiques," Par., 1798, 3 vols., 8vo; "Traité de Méd.-lég. et d'Hyg. publ.," Par., 1813, 6 vols., 8vo.

[2] "Méd.-lég.," etc., Rouen, 1801; Paris, 1807, 1811.

[3] "Cours. de Méd.-lég.," Paris, 1809, 1811, 1819.

[4] "Aperçu et obs. s. l. Méd.-lég.," Lyon, 1811; "Secours aux Asphyxiés," Lyon, 1818; "Man. d. Méd.-lég.," Lyon, 1821.

[5] In the later editions Chaudé took the place of Brosson, and a chemist, J. Bouis, was added.

[6] Devergie, "Méd.-lég.," 1836, contains a legal chapter by de Robécourt. Paris and Fonblanque, "Med. Jurispr.," Lond., 1823; Wharton and Stillé, "Med. Jur.," Phila., 1855; Le Grand du Saule, Berryer et Pouchet, "Tr. de Méd.-lég. de Jur. méd. et de Tox.," 2d ed., Par., 1881.

Special treatises on the medico-legal relations of insanity were published by Georget (1821), Falvet (1828), Esquirol (1838), and Marc (1840), and on midwifery by Capuron (1821).

Tardieu, Professor of Legal Medicine in the University of Paris (1861–79), published a most important series of monographs on hygienic and medico-legal subjects,[1] besides many papers, principally in the *Annales d'Hygiène, etc.*, and testified before the courts in many "*causes célèbres.*"

The first work of medico-legal interest to appear in Germany was the "Medicus-Politicus" of Rodericus à Castro, a Portuguese Jew living in Hamburg, printed in 1614, which deals principally with medical ethics and the relations of physicians, but contains chapters on simulated diseases, poisoning, wounds, drowning, and virginity.[2]

It was only toward the end of the seventeenth century that the subject was scientifically treated, and during the latter part of the seventeenth century and the beginning of the eighteenth great progress was made in the development of forensic medicine in Germany. Johannes Bohn, one of the originators of the experimental method of investigation in physiological chemistry and physics, at the University of Leipzig, was also one of the earliest German contributors to the literature of legal medicine. Besides smaller works he published two noteworthy treatises: in 1689 a work on the examination of wounds and the distinction between ante-mortem and post-mortem wounds, and between death by injury, strangulation, and drowning.[3] In 1704 a work giving rules for the conduct of physicians in attending the sick and in giving evidence in the courts.[4] At about the same period M. B. Valentini, professor in the University of Giessen, published three important works, containing collections of medico-legal cases, and of the opinions and decisions

[1] "Sur les Attentats aux Mœurs," 1st ed., 1857; 7th ed., 1878; "Sur l'Avortement," 1856, 1861, 1868; "Sur la Pendaison," etc., 1865, 1870, 1879; "Sur l'Empoisonnement" (with Z. Roussin), 1867, 1875; "Sur l'Infanticide," 1868; "Sur la Folie," 1872; "Sur les Blessures," 1879; "Sur les Maladies, etc.," 1879.

[2] Lib. iv., cap. ix.: Qua ratione morbum simulantes deprehendi queant; cap. x.: testificandi methodus circa eos, quibus venenum fuit exhibitum; cap. xi.: testificandi ratio in vulneribus capitis; et in iis qui aquâ fuerunt suffocati; cap. xii.: Quomodo amissa virginitas: et alterius utrius conjugis sterilitas deprehendatur.

[3] "De renunciatione vulnerum," etc., Lips., 1689, 8vo ("Egregium opus," Haller).

[4] "De officio medici duplici, clinico nimirum et forensi," Lips., 1704, 4to ("Eximius liber," Haller).

of previous writers.[1] Another extensive collection of cases and decisions was published in 1706 by J. F. Zittmann, from a MS. left by Professor C. J. Lange, of the University of Leipzig;[2] and still another by J. S. Hasenest[3] appeared in 1755.

During the latter part of the eighteenth century, the Germans cultivated legal medicine assiduously, and a great number of works upon the subject were published. Among these may be mentioned those of M. Alberti, professor at the University of Halle;[4] H. F. Teichmeyer, of the University of Jena;[5] A. O. Gölicke, of the universities of Halle and Duisburg, who was the first to prepare a bibliography of the subject;[6] J. F. Fasel (Faselius), professor at Jena;[7] J. E. Hebenstreit and C. S. Ludwig, professors at Leipzig;[8] C. F. Daniel, of Halle;[9] J. D. Metzger, professor at Königsberg, the author of a number of works, one of which, a compendium, was translated into several other languages;[10] J. V. Müller, of Frankfurt;[11] J. C. T. Schlegel, who collected a series of more than forty dissertations by various writers;[12] M. M. Sikora, of Prague;[13] J. J. von Plenck, professor in Vienna, who published a work on forensic medicine and one on toxicology;[14] K. F. Uden, subsequently professor in St. Petersburg, who was the first to publish a periodical journal devoted to legal medicine, which

[1] "Pandectæ Medico-legales," etc., Francof., 1701, 4to; "Novellæ Medico-legales," etc., Francof., 1711, 4to; "Corpus Juris Medico-legale," etc., Francof., 1722, fol.

[2] "Medicina forensis, hoc est responsa facultatis medicæ Lipsiensis ad quæstiones et casus medicinales, ab anno 1650 usquè 1700," Francof., 1706, 2 vols., 4to.

[3] "Der medicinische Richter, oder Acta physico-medico forensia Collegii medici Onoldini," Onolzbach, 1755, 4to.

[4] "Systema Jurisprudentiæ Medicæ," etc., 6 vols., 4to, Halle, Leipzig, and Görlitz, 1725–47.

[5] "Institutiones Medicinæ legalis et forensis," Jena, 1723, 1731, 1740, 1762.

[6] "Medicina forensis demonstrativa," etc., Frankf., ad Viadr., 1723; "Introductio in historiam litterariam scriptorum qui medicinam forensem commentarius suis illustraverunt," Frankf., 1723, 1735.

[7] "Elementa Medicinæ forensis," Jena, 1767, published posthumously.

[8] Hebenstreit: "Anthropologia forensis," Lips., 1753; Ludwig: "Institutiones Medicinæ forensis," ed. 2, Lips., 1774.

[9] "Beiträge zur medicinischen Gelehrsamkeit," etc., Halle, 1748–54; "Sammlung medicinischen . . . Zeugnissen," etc., Leipz., 1776; "Institutionum Medicinæ publicæ," etc., Lips., 1778.

[10] "Kurzgefasstes System der gerichtlichen Arzneywissenschaft," Königsb. u. Leipz., 1793.

[11] "Entwurf der gerichtlichen Arzneiwissenschaft," etc., Frankf., 1796–1801, 4 vols.

[12] "Collectio Opusculorum selectorum ad Medicinam forensem spectantium," Lips., 1785–90, 6 vols.

[13] "Conspectus Medicinæ legalis," etc., Prague, 1780.

[14] "Elementa Medicinæ et Chirurgiæ forensis," Viennæ, 1781; "Toxicologia," etc., Viennæ, 1785.

was afterward continued by J. F. Pyl at Stendal;[1] and J. C. Fahner.[2]

At this period compends for students were published in Germany, which indicate by their number the extent to which this science was the subject of study. Among these those of Ludwig (1765), Kannegieser (1768), von Plenck (1781), Frenzel (1791), Loder (1791), Amemann (1793), Metzger (1800), and Roose may be mentioned.

The Germans of the present century have maintained the pre-eminence in legal medicine achieved by their forefathers. Among a great number of investigators and writers a few may be mentioned: C. F. L. Wildberg, professor at Rostock, was a most prolific writer, edited a journal devoted to state medicine, and contributed a valuable bibliography of the subject;[3] A. F. Hecker, professor at Erfurth and afterward at Berlin, and J. H. Kopp each edited and contributed extensively to a medico-legal journal.[4] A much more important periodical was established in 1821 by Adolph Henke, professor in Berlin, and was continuously published until 1864. Henke also wrote a great number of articles and a text-book on legal medicine.[5] Jos. Bernt, professor at Vienna, published a collection of cases, a systematic treatise, and a number of monographs,[6] as well as the MS. work left by his predecessor in the chair, F. B. Vietz. A handbook containing an excellent history of medico-legal science was published by L. J. C. Mende, professor at Griefswald,[7] who also contributed a number of monographs, chiefly on obstetrical subjects. K. W. N. Wagner contributed but little to the literature of the subject, but it was chiefly by his

[1] Magazin für die gerichtliche Arzneikunde und medicinische Polizei, Stendal, 1782–87, 6 vols. Pyl also published "Aufsätze und Beobachtungen aus der gerichtlichen Arzneiwissenschaft," Berlin, 1783–93, 8 vols. Uden was the first to edit a medical journal in Russia.

[2] "Vollständiges System der gerichtlichen Arzneykunde," Stendal, 1795–1800; "Beiträge zur praktischen und gerichtlichen Arzneikunde," Stendal, 1799.

[3] Jahrb. der gesam. Staatsarzneikunde, Leipzig, 1835–40, 7 vols.; "Bibliotheca Medicinæ publicæ." Berol., 1819, 2 vols. Between 1804 and 1849 Wildberg published fifteen books and treatises on medico-legal subjects.

[4] Kritische Jahrb. f. d. Staatsarznk. f. d. xix. Jahrh., 1806–09. Jahrb. d. Staatsarznk., 1808–19.

[5] Zeitschrift für die Staatsarzneikunde, Erlangen, 1821–64, 118 vols.; "Lehrbuch der ger. Med.," 1te Aufl., Berlin, 1812, 13te Aufl., Berlin, 1859.

[6] "Visa Reperta," Wien, 1827–45, 3 vols.; "Systematisches Handb. d. ger. Med.," Wien, 1te Aufl., 1813, 5te Aufl., 1846.

[7] "Ausführl. Handb. d. ger. Med.," Leipzig, 1819–32, 6 vols.

efforts, while professor in the University of Berlin, that a department for instruction in state medicine was established there in 1832. A. H. Nicolai, also professor at Berlin, published a handbook[1] besides numerous articles in the journals. F. J. Siebenhaar published an encyclopædia of legal medicine, and in 1842 established a journal devoted to state medicine, which in its continuations was published until 1872.[2] J. B. Friedreich, professor at Erlangen, after editing a journal devoted to state medicine from 1844 to 1849, established one of the most important of current medico-legal periodicals in 1850,[3] to both of which he was a frequent contributor until his death in 1862. Ludwig Choulant, professor at Dresden, and more widely known as the author of important contributions to the history of medicine, published two series of reports of medico-legal investigations.[4]

The foremost forensic physician of this period in Germany was unquestionably John Ludwig Casper, professor in the University of Berlin and "forensic physician" (gerichtlicher Physicus) to that city, who greatly extended the department established in the university under Wagner. He made innumerable investigations, some of which are preserved in several collections of cases,[5] others in his classic Handbook,[6] and still others in the periodical which he established in 1852, and which is now the most important current medico-legal journal.[7]

It is necessary in this place to make mention of one work by living authors, as its appearance marked a new departure in medico-legal literature, and as in it the fact that forensic med-

[1] "Handb. d. ger. Med.," Berlin, 1841.

[2] "Enzyklop. Handb. d. ger. Arzneyk.," Leipzig, 1838–40, 2 vols.; Magazin f. die Staatsarzneykunde.

[3] Centralarch. f. d. ges. Staatsarznk., Ansbach, 1844–49; Blätter f. d. gerichtliche Anthropologie, Erlangen, 1850, now published at Erlangen under the title Friedreich's Blätter f. ger. Med. u. Sanitätspolizei.

[4] "Gutachten u. Aufsätze," etc., Leipzig, 1847; "Auswahl von Gutachten," etc., Dresden, 1853.

[5] "Beiträge z. medicin. Statistik," etc., Berl., 1825–35, 2 vols.; "Denkwürdigkeiten z. medicin. Statistik," etc., Berl., 1846; "Gerichtl. Leichen-Oeffnungen," Berl., 1851–53, 1850–52; "Klinische Novellen," etc., Berl., 1863.

[6] "Pract. Handb. d. ger. Med.," Berl., 1te Aufl., 1857–58; 8te Aufl., Berl., 1889, also translation of Geo. Balfour, New Sydenham Soc., London, 1861–65. The fourth and succeeding editions, published after Casper's death (1864), were edited by Karl Liman, his successor in the chair of medical jurisprudence (d. 1892).

[7] Vierteljahresschr. f. ger. u. öffentl. Med., Berl., 1852, edited after Casper's death by Horn, 1865–70, Eulenberg, 1871–90, Wernich, 1891.

icine extends over so wide a field of inquiry as to require treatment at the hands of specialists was first recognized. To Josef von Maschka, professor in the University of Prague, the credit is due of having been the first to produce, with the collaboration of twenty-two colleagues, a truly systematic work on modern forensic medicine.[1]

English works upon this subject did not exist prior to the present century,[2] although physicians were employed by the courts to determine medical questions of fact at a much earlier date. Paris and Fonblanque, in the third Appendix of their "Medical Jurisprudence," give the text of reports by the Colleges of Physicians of London and of Edinburgh concerning the cause of death as early as 1632 and 1687 respectively.[3]

Lectures on medical jurisprudence were given at the University of Edinburgh by A. Duncan, Sr., at least as early as 1792.[4] The title of Professor of Medical Jurisprudence in a British university was conferred for the first time, however, upon A. Duncan, Jr., at the University of Edinburgh in 1806.[5]

The first English work on medical jurisprudence worthy of consideration is the medical classic known as Percival's "Medical Ethics." This was first published in 1803, and contains in

[1] "Handb. d. ger. Med.," Tübingen, 1881–82, 4 vols.

[2] Daniel: "Bibl. d. Staatsarznk.," Halle, 1784, No. 107, mentions: "E. Prat, Rationarium chirurgicum, oder nothwendiges Handbuch des Wundarztes, wie er Bericht an die Obrigkeit thun soll u. s. w., aus dem Engl.," Hamb., 1684. 4, 690. 8. The same title is reproduced by Wildberg (No. 239) in 1819, and the edition of 1684 is mentioned by Ploucquet, "Initia" (1803), Suppl. iv., 36, and "Litt. med. dig." (1809), iii., 54, the name of the author being given as "Pratt (Elias)." This may be an early work by Ellis Pratt, but we can find no mention of it elsewhere. In the years 1734, 1761, and 1787 dissertations on abortion were defended at Edinburgh by Arnot, Harris, and Murray. Three treatises on death from suffocation by Goodwyn, Frank, and Coleman appeared in 1788–91. In 1788 S. Farr published at London his "Elements of Medical Jurisprudence," to which Percival ("Med. Ethics," Oxford, 1849, p. 102) justly refers as "a valuable epitome of S. F. Faselii's "Elementa Medicinæ Forensis [Regiom., 4to, 1787], in English by Dr. Farr."

[3] "Med. Jur.," iii., p. 226 *seq.* Report that Joseph Lane died of poison (1623). Report that Sir James Standsfield was strangled and not drowned, with account of autopsy (1687). Also extracts from the medical evidence in the cases of Spencer Cowper (from 13 Howell's "State Trials"); Mary Blandy (Oxford, 1752); John Donellan (Warwick, 1781); and R. S. Donnall (Launceston, 1817).

[4] "Heads of Lectures on Medical Jurisprudence, or the Institutiones Medicinæ legalis," vi., 24 pp., 8vo, Edinb., 1792.

[5] See Beck: "Med. Jur.," 7th ed., xvi., and note.

its fourth chapter an admirable epitome of legal medicine.[1] A more elaborate work, based very largely, however, upon the writings of continental authors, was published by G. E. Male in 1816.[2] In 1821 Professor John Gordon Smith published the first systematic treatise on forensic medicine,[3] and was one of the first in Great Britain to show the importance of the subject.

Two years later, in 1823, appeared the elaborate and scholarly work of Dr. Paris and Mr. Fonblanque, the first in the English language in whose authorship members of the medical and legal professions were associated.[4] In 1831, Prof. Michael Ryan published the first edition of his "Manual of Medical Jurisprudence" from the memoranda of his lectures on the subject in the Westminster School of Medicine.[5] A similar work was published by Professor T. S. Traill, of the University of Edinburgh, in 1836.[6] The awakened interest in medico-legal subjects among the medical profession during the decade 1830–40 is evidenced by the publication in the medical journals of the lectures of A. Amos, in 1830–31; of A. T. Thomson, at the London University, in 1834–35; of H. Graham, at Westminster Hospital, in 1835; of W. Cummin, at the Aldersgate Street School, in 1836–37; and of T. Southwood Smith, at the Webb Street Theatre of Anatomy, in 1837–38.[7]

[1] In the preface Dr. Percival says: "This work was originally entitled 'Medical Jurisprudence,' but some friends having objected to the term *Jurisprudence* it has been changed to *Ethics*." An unfinished and unpublished edition, written prior to 1794 and containing Chapter IV., was printed about 1800 (see Editor's Preface, p. 2, and note, Author's Preface, pp. 25, 26, ed. Oxford, 1849).

[2] "An Epitome of Juridical or Forensic Medicine," etc., viii., 199 pp., 8vo, London, 1816, also in Th. Cooper's "Tracts on Med. Jur.," Phila., 1819. In the preface the author refers to the lectures of Prof. Duncan.

[3] This excellent work ("The Principles of Forensic Medicine") went through three editions in six years. Dr. Smith, who was a teacher of medical jurisprudence in the Royal Institution, Westminster Hospital, and University of London, and also published a number of papers in the Edinb. M. and S. Jour., and "Hints for the Examination of Medical Witnesses," Lond., 1829, died at the age of forty-one in 1833, after fifteen months' imprisonment in a debtors' prison.

[4] "Med. Jur.," 3 vols., 8vo, London, 1823. See note 1, p. v.

[5] "A Manual of Med. Jur.," London, 1831, 2d ed., 1836, Amer. ed., with notes by R. E. Griffith, Phila., 1832.

[6] "Outlines of a Course of Lectures on Med. Jur.," Edinb., 1836, 2d ed., 1840, Amer. ed., Phila., 1841.

[7] A. Amos, Lond. M. Gaz., 1830, vii.; 1831, viii. A. T. Thomson, Lond. M. and S. J., 1834–35, vi.; 1835, vii.; also Lond. Lancet, 1836–37, i., ii. (Thomson's lectures were printed in German in book form, Leipzig, 1840.) H. Graham, Lond. M. and S. J., 1835, vi., vii. W. Cummin, Lond. M. Gaz., 1836–37, xix. T. S. Smith, Lond. M. Gaz., 1837–38, xxi.; 1838, xxii.

Among the noteworthy contributions to the science previous to 1850 are the writings of Dease (1808), Haslam (1817,)[1] Christison, the successor of Professor Duncan in the University of Edinburgh, and best known as a toxicologist, Forsyth (1829),[2] Chitty (1834),[3] Watson (1837),[4] Brady (1839),[5] Skae (1840),[6] Pagan (1840),[7] and Sampson (1841).[8]

In 1836, Dr. Alfred Swaine Taylor (b. 1806, d. 1880), the first Professor of Medical Jurisprudence in Guy's Hospital, published his "Elements of Medical Jurisprudence." This, the most important work upon the subject in the English language, is now in its twelfth English and eleventh American edition. During forty years of devotion to forensic medicine Dr. Taylor also contributed other important works and numerous papers, published for the most part in the Reports of Guy's Hospital.[9] In 1844, Dr. Wm. A. Guy, Professor of Forensic Medicine in King's College, published the first edition of his excellent work.[10] In 1858, Fr. Ogston, Professor of Medical Jurisprudence in the University of Aberdeen, published a syllabus and subsequently (1878) a complete report of his lectures.[11] In 1882, C. M. Tidy, Professor of Chemistry and Forensic Medicine in the London Hospital, who had previously (1877) been associated with W. B. Woodman in the authorship of a valuable handbook, began the publication of a more extended work, which was interrupted by his death in 1892.[12]

[1] Dease: "Med. Jur.," and Haslam: "Med. Jur. Insanity," along with the treatises of Farr and of Male, are reprinted in Cooper's "Tracts on Med. Jur.," Phila., 1819.

[2] "Synop. Mod. Med. Jur.," Lond., 1829.

[3] "Treatise on Med. Jur.," Lond., 1834; Phila., 1836.

[4] "Homicide by External Violence," Lond., 1837.

[5] "Med. Jur.," Dublin, 1839.

[6] "Cases in Leg. Med.," Edinb., 1840.

[7] "Med. Jur. of Insanity," Lond., 1840.

[8] "Criminal Jurisprudence in relation to Mental Organization," London, 1841.

[9] "Principles and Practice of Med. Jur.," 1st ed., Lond., 1865; 3d ed., Lond., and Phila., 1883. "On Poisons," 1st ed., Lond., 1848; 3d ed., Lond., 1875. "Lectures on Med. Jur.," Lond. M. Gaz., 1846, n. s., ii., iii.; 1847, n. s., iv. Articles on arsenic, antimony, strychnin, and other toxicological subjects, strangulation, blood-stains, etc., in Guy's Hosp. Repts.

[10] "Principles of Forensic Medicine," Lond., 1844. The work is now in its sixth edition, Prof. D. Ferrier, Dr. Guy's successor in King's College, having been associated in the authorship of the 4th ed. in 1875 and subsequently.

[11] "Lectures on Med. Jur.," edited by Fr. Ogston, Jr., Lond., 1878.

[12] Woodman and Tidy: "A Handybook of Forensic Medicine and Toxicology," Lond. and Phila., 1877. Tidy. "Legal Medicine," 2 vols., Lond., 1882–83; also, Phila., 2 vols., 1882–84; New York, 3 vols., 1882–84.

The first Spanish work on legal medicine was that of Juan Fernandez del Valles, printed in 1796–97.[1] No further contribution to medico-legal literature was furnished by Spain until the appearance in 1834 of the work of Peiro and Rodrigo, which went through four editions in ten years.[2] Ten years later, in 1844, Pedro Mata, Professor of Legal Medicine and Toxicology at Madrid, published the first edition of a work, which in the development of its subsequent editions, has become the most important on the subject in the Spanish language.[3]

The first Portuguese medico-legal treatise was that of Jose Ferreira Borjes, first printed at Paris in 1832.[4]

A posthumously published report of the lectures of Albrecht von Haller was the earliest Swiss work on forensic medicine.[5]

In Sweden the earliest medico-legal publication was a comprehensive treatise by Jonas Kiernander, in 1776,[6] which was followed in 1783 by a translation of Hebenstreit, by R. Martin. The voluminous writings of the brothers Wistrand (A. T. and A. H.), including a handbook, were published at Stockholm, between 1836 and 1871. Between 1846 and 1873, several articles upon medico-legal subjects were published at Helsingfors, in Finland, by E. J. Bonsdorff, O. E. Dahl, and J. A. Estlander. In 1838 Skielderup[7] published his lectures on legal medicine, delivered at Christiania, and Orlamundt[8] published a handbook at Copenhagen in 1843. The earliest recognition of medico-legal science in Russia was in the lectures of Balk,[9] begun in 1802 at the then newly founded University of Dorpat.

Although dissertations upon subjects of medico-legal interest were published at the University of Leyden as early as the

[1] "Cirurgia Forense," etc., 3 vols., 12mo, Madrid, 1796–97. Wildberg mentions two earlier monographs: "De partu Septimestri," Antw., 1568, by F. Mena, physician in ordinary to Philip II.; and "Diez privilegios para mugeres prennantes," Complut., 1606, by J. A. de Fontechia, professor at Alcala de Hénares.

[2] "Elementos de Medicina y Cirurgia legal," etc., Madrid, 1834; 4th ed., Zaragossa, 1844.

[3] "Tratado de Medicina y Cirurgia legal," etc., Madrid, 1844; 5th ed., 4 vols., 8vo, Madrid, 1874–75.

[4] "Instituições de Medicina forense," Paris, 1832; 2d ed., Lisbon, 1840.

[5] "Vorlesungen über die gerichtliche Arzneiwissenschaft," 3 vols., 12mo, Bern, 1728–84.

[6] "Utkast til Medicinal-Lagfarenheten," etc. (Project of medical jurisprudence, etc.) Stockh., 1776.

[7] "Forelaesninger over den legale Medicin," Christiania, 1838.

[8] "Haandbog i den legale Medicin," Kjøbenhavn, 1843.

[9] "Versuch eines Umrisses der philosophisch.-medizinischen Jurisprudenz," u. s. w., Dorpat, 1803

middle of the seventeenth century,[1] and the works of Pineau,[2] Zacchias,[3] Ludwig,[4] von Plenk,[5] and Metzger[6] were printed in Holland, either in Latin or in the vernacular, no original systematic work on legal medicine in the Dutch language has yet appeared.

The only Belgian contribution to the literature of forensic medicine, other than articles in the journals, is a text-book by A. Dambre, first published at Ghent in 1859.[7]

Two medico-legal works have been printed in the Japanese language, one a report of the lectures of Professor Ernst Tiegel, at the University of Tokio,[8] the other a treatise by Katayama.[9]

In the United States the development of forensic medicine has kept pace with that in the mother country. In an introductory address delivered at the University of Pennsylvania in 1810, the distinguished Dr. Benjamin Rush dwelt eloquently upon the importance of the subject.[10] In 1813, Dr. James S. Stringham was appointed Professor of Medical Jurisprudence in the College of Physicians and Surgeons of New York, and a syllabus of his lectures was published in the following year.[11] At the same period (1812–13) Dr. Charles Caldwell delivered a course of lectures on medical jurisprudence in the University of Pennsylvania.[12] In 1815, Dr. T. R. Beck was appointed Lecturer on Medical Jurisprudence in the College of Physicians and Surgeons of the Western District of the State of New York; and soon after Dr. Walter Channing was appointed Professor of Midwifery and Medical Jurisprudence in Harvard University. In 1823, Dr. Williams, in the Berkshire Medical Institute, and Dr. Hale, of Boston, each lectured upon the subject.[13]

In 1819, Dr. Thomas Cooper, formerly a judge in Pennsyl-

[1] See Wildberg: "Bibl. med. leg.," Nos. 1,198, 1,142, 1,215.

[2] Lugd. Bat., 1610, etc.

[3] Amstel. 1615.

[4] Rotterd., 1767.

[5] Lugd. Bat., 1768.

[6] S. Gravenh., 1815.

[7] "Traité de Médecine légale et de Jurisprudence de la Médecine," 2 vols. in 1, Gand., 1859-60; 2d ed., Paris, 1878: 3d ed., Bruxelles, 1885. (See Toxicology.)

[8] "Yei sei honron" (Lectures on medical jurisprudence, translated by Gento Oye), 3d ed., 2 vols., Tokio, 1880.

[9] "Saiban igaku teiko" (Medical Juris.), 3 vols., Tokio, 1882–84.

[10] "Sixteen Introductory Lectures," etc., Phila., 1811, pp. 363–395.

[11] Amer. Med. and Phil. Reg., N. Y., 1814, iv., 614. It is to be regretted that instruction in medical jurisprudence is not now given at this school (1893).

[12] Beck: "Med. Jur.," 7th ed., xix. The Index Catalogue contains the titles of forty-nine works by Caldwell, none of which are medico-legal.

[13] Beck, *loc. cit.*

vania, and at that time Professor of Chemistry and Mineralogy in the University of Pennsylvania, reprinted, with notes and additions, the English works of Farr, Dease, Male, and Haslam.[1] The works of Ryan, Chitty, Traill, and Guy were also reprinted in this country shortly after their publication in England.

In 1823, Dr. Theodric Romeyn Beck published at Albany the first edition of a treatise as admirable for scholarly elegance of diction as for profound scientific research. This remarkable work, *facile princeps* among English works on legal medicine, has had twelve American and English editions, and has been translated into German and Swedish.[2]

Papers upon medico-legal subjects or reports of lectures were published by J. W. Francis,[3] J. Webster,[4] R. E. Griffith,[5] R. Dunglison,[6] J. Bell,[7] and S. W. Williams[8] between 1823 and 1835. In 1840, Amos Dean, Professor of Medical Jurisprudence at the Albany Medical College, published a medico-legal work, followed by another in 1854, which with the later work of Elwell are the only treatises on forensic medicine upon the title-pages of which no physician's name appears.[9]

Numerous papers and tracts upon medico-legal subjects were published by J. J. Allen, T. D. Mitchell, H. Howard, D. H. Storer, J. S. Sprague, J. S. Mulford, J. F. Townsend, and A. K. Taylor between 1840 and 1855. In the latter year appeared the first edition of the admirable work of Francis Wharton and Dr. Moreton Stillé, the first American product of the collaboration of members of the two professions, now in its fourth edition.[10]

Between 1855 and 1860 no systematic treatises on legal

[1] "Tracts on Medical Jurisprudence," etc., Phila., 1819.

[2] "Elements of Medical Jurisprudence," 2 vols., 8vo, Albany, 1823; 12th ed., 2 vols., 8vo, Phila., 1863. A chapter on Infanticide by John B. Beck was added to the third edition. This and later editions are "by T. R. and J. B. Beck."

[3] N. Y. Med. and Phys. Jour., 1823, ii., 9–30.

[4] "An Essay on Medical Jurisprudence," Phila., 1824.

[5] Phila. J. M. and Phys. Sc., 1825, x., 36–46.

[6] "Syllabus of Lectures," etc., Univ of Va., 1827.

[7] "An Introductory Address," etc., Phila., 1829, and "Syllabus of a Course of Lectures on . . . Medical Jurisprudence in the Philadelphia Medical Institute" [n. p., n. d.].

[8] "A Catechism of Medical Jurisprudence," etc., Northampton, 1835.

[9] Dean (A.): "Manual of Medical Jurisprudence," Albany, 1840: Dean (A.): "Principles of Medical Jurisprudence," Albany, 1854: Elwell (J. J.): "Medico-legal Treatise on Malpractice and Evidence." New York, 1860; 4th ed., New York, 1881.

[10] "Medical Jurisprudence." Phila., 1855, 4th ed., edited by R. Amory and E. S. Wood, 3 vols., Phila., 1884.

medicine were published, although the medical journals contained numerous articles bearing upon the subject. In 1860 the first edition of a treatise written from the legal aspect was published by J. J. Elwell.[1] At the present time the great number and variety of articles published in the medical and legal journals, bearing upon every branch of forensic medicine and of medical jurisprudence, and written for the most part by specialists, is evidence of the assiduity with which the science is cultivated.

The wide appreciation of the importance of medico-legal science in the United States is also indicated by the fact that at the present time there are but few medical schools in which the subject is not taught. To ascertain the extent of medico-legal instruction at the present time, a circular of inquiry was sent to the deans of 124 medical schools and of 56 law schools in the United States and British provinces. Answers were received from 103 medical colleges. Of these only 3 are without a teacher of "medical jurisprudence." In 38 the teacher is a physician, in 50 he is a lawyer, in 5 he is a graduate in both professions, and 3 have two teachers, one a lawyer, the other a physician. The average number of lectures given is 21, and the average in those schools in which the teacher is a lawyer, and therefore presumably teaches only medical jurisprudence, is 15. The medico-legal relations of their subjects are taught in their lectures by the neurologist in 62 schools, by the surgeon in 66, by the obstetrician in 69, and by the chemist (toxicology) in 91. It appears from these reports that not only is the importance of medico-legal science appreciated, but that in the majority of our medical schools the distinction between medical jurisprudence and forensic medicine is recognized in the fact that the instructor is a lawyer, who presumably teaches medical jurisprudence, while the different branches of forensic medicine and toxicology are taught by the specialists most competent to deal with them. Every practising physician requires thorough instruction in medical jurisprudence, which, being strictly legal, is best taught by one whose profession is the law. The general practitioner only requires so much knowledge of the different branches of forensic medicine as will enable him to intelligently

[1] "A Medico-legal Treatise on Malpractice and Medical Evidence," N. Y., 1860; 4th ed., N. Y., 1881.

fulfil his obligations in such medico-legal cases as will be forced upon him as results of his ordinary practice. He can become a medical expert only by a particular study of and a large experience in some individual branch of the subject.

In our law schools the teaching of medico-legal science is not as general as in schools of medicine. Of 35 law schools, only 10 have professors of medical jurisprudence. Of these 6 are lawyers, 1 is a physician, 2 are graduates in both professions, and 1 is a doctor of divinity.

In this work the existence of specialists in the various branches of medico-legal science has been recognized for the first time in a treatise in the English language. Each branch has been assigned to a specialist in that subject, or at least to one who has made it a particular study.

In the arrangement of the matter, the primary division into the three sciences of medical jurisprudence, forensic medicine, and toxicology has been adopted. The division of pure medical jurisprudence is contained in the present volume, while the legal aspects of neurology, obstetrics, etc., will be treated of in future volumes along with the subjects to which they relate. In the division of forensic medicine the classification of Casper has been followed: *i.e.*, *Thanatological;* including those branches in which the subject of inquiry is a dead body (contained in the present volume). *Bio-thanatological;* relating to questions concerning both dead bodies and living persons (in the second volume). *Biological;* relating to living persons (in the second and third volumes). The applications of the microscope to forensic medicine will be treated of in the third volume. The fourth volume will contain the division relating to toxicology.

R. A. W.

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MEDICAL JURISPRUDENCE

THE LEGAL RELATIONS

OF

PHYSICIANS AND SURGEONS

INCLUDING

THEIR ACQUIREMENT OF THE RIGHT TO PRACTISE MEDICINE AND SURGERY; THEIR LEGAL DUTIES AND OBLIGATIONS; THEIR RIGHT TO COMPENSATION; THEIR PRIVILEGES AND DUTIES WHEN SUMMONED AS WITNESSES IN COURTS OF JUSTICE, AND THEIR LIABILITY FOR MALPRACTICE.

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LEGAL STATUS OF PHYSICIANS.

CHAPTER I.

OF THE RIGHT TO PRACTISE MEDICINE AND SURGERY.

Legal Definition and History of the Terms Physician and Surgeon.

At common law the right to administer drugs or medicines or to perform surgical operations was free to all. And such was the rule of the Roman civil law. But the importance of prescribing certain educational qualifications for those who made such practices their means of gaining a livelihood soon became apparent, and as early as the year 1422, during the reign of Henry the Fifth in England, an act of Parliament was adopted forbidding any one, under a penalty of both fine and imprisonment, from "using the mysterie of fysyck unless he hath studied it in some university and is at least a batchellor of science."

As a result of this and other statutory regulations, a class of professional men arose, who were called "physicians," because they professed to have the qualifications required by such legal regulations wisely to prescribe drugs and medicines for the cure of diseases. A chirurgeon or surgeon—Latin, chirurgus; Greek, χειρουργος, compounded of χειρ, the hand, and ἐργειν, to work—as the derivation of the word shows, was one who professed to cure disease or injuries by manual treatment and appliances.

It would be more interesting than profitable to trace the history of these terms, and of the professions of medicine and surgery from the early times, when the clergy administered healing to the body as well as to the soul, when barbers were generally surgeons, and blood-letting by the knife-blade and the use of leeches caused the common application of the term "leech" to those who practised surgery.

Definition.—For the purposes of this treatise, however, it will be sufficient to define the term "physician," as meaning any one who professes to have the qualifications required by law to practise the administration of drugs and medicines, and the term "surgeon," as meaning any one who professes to have the like qualifications to perform surgical operations, for the cure of the sick or injured.

For a list of the early statutes of England relating to the practice of medicine the reader may consult Ordronaux' "Jurisprudence of Medicine," p. 5, note 2.

The present statutory regulations throughout the United States and in England and Canada are more particularly referred to and synopsized hereafter in this volume.[1]

[1] Vol. I., pp. 135 *et seq.*

CHAPTER II.

ACQUIREMENT OF LEGAL RIGHT TO PRACTISE MEDICINE AND SURGERY.

Now Generally Regulated by Statute.—In nearly all of the United States, as well as in England, France, Germany, and other civilized and intelligent communities, the legal right to practise the administration of drugs and medicines, or to perform operations in surgery for the purpose of curing diseases or injuries, has for many years been the object of statutory legislation. The necessity and propriety of regulating by law such practices is generally conceded; it is manifest to all that a person engaging in the practice of medicine or surgery as a profession is holding himself out to the world, and especially to his patients, as one qualified by education and experience to possess more than ordinary skill and ability to deal with the great problems of health and life. He professes to the world that he is competent and qualified to enter into the closest and most confidential relations with the sick and afflicted, and that he is a fit and proper person to be permitted freely, and at all hours and all seasons, to enter the home, the family circle, and the private chamber of persons suffering from disease or injury. All this he professes and does upon his own account, and for his own profit.

Statutory Regulation of the Right to Practise, Constitutional.—The exercise by the States of these statutory powers is upheld as a valid exercise of the "police power," to protect the health of the community. When the constitutionality of such enactments has been questioned, it has been alleged that the statutes under question unjustly discriminated in favor of one class of citizens and against another class; and that they deprived those already engaged in the practice of medicine or surgery of "their property without due process of law." State *v.* Pennoyer, 18 Atl. Rep., 878; *ex parte* Spinney,

10 Nev., 323; People *v.* Fulda, 52 Hun (N. Y.), 65–67; Brown *v.* People, 11 Colo., 109.

Opinion of United States Supreme Court.—This subject has been carefully considered by the United States Supreme Court in a recent case, and the broad extent of the legislative powers of the States to regulate such matters clearly and fully declared. Dent *v.* West Va. (129 U. S., 114). The Court say—pp. 121 *et seq.*—Mr. Justice Field delivering the opinion, in which all the other Justices concur: "The unconstitutionality asserted consists in its [the statute's] alleged conflict with the clause of the Fourteenth Amendment, which declares that no State shall deprive any person of life, liberty, or property, without due process of law; the denial to the defendant of the right to practise his profession, without the certificate required, constituting the deprivation of his vested right and estate in his profession, which he had previously acquired.

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being gener-

ally ascertained upon an examination of the parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society, may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practise in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attain-

ments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the plaintiff in error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practise medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications. As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden. They come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law. They were deemed to be equivalent to 'the law of the land.' In this country the requirement is intended to have a similar effect against legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters: that is, by process or proceedings adapted to the nature of the case."

Early Common-Law Rule Concerning Suits by Physicians.

The common-law rule was that the physician could not sue and recover for his services, though he might for the medicines he furnished. The theory of the law followed the etiquette of his profession and forbade him from making a specific contract for pay for his services, and obliged him to receive what his patient chose to give him, which was called his "*honorarium*."

The Early Common-Law Rule No Longer in Force.— As time went on this theory vanished from the law. For many years it has lost its place among the rules of professional etiquette. In its stead statutory provisions have been adopted which forbid a recovery for services performed by persons not legally authorized to practise. The right of the physician and surgeon to contract with the patient or with those who employ him, and his remedies to enforce such contracts, will be considered hereafter.

History of Statutory Regulation in New York State.— Most of the States of the United States have enacted statutory regulations prescribing in one form or another the necessary qualifications which entitle a physician or surgeon to practise, and prescribing penalties for practising without having complied with such statutory requirements. These statutes are digested and collated below, pp. *et seq.* A review of the course of development of statutory regulation in New York State is instructive as well as interesting. In that State such matters were regulated for the first time by statute in 1787. This was followed by a general enactment on the subject of the organization of county medical societies, and of State medical societies having boards of censors, to whom was committed the power to examine applicants for license to practise, and of issuing licenses (Laws of 1813, p. 94). This law remained in force, with certain modifications, until 1844, when all acts regulating the practice of medicine and surgery were repealed. A history of the statutory regulations in New York State up to the act of 1844 on this subject will be found in the case of Bailey *v.* Mogg, 4 Denio, 60.[1]

[1] In that case (Bailey *v.* Mogg), the Court says of that statute (Laws of 1844, p. 406): "The triumph was now complete, for the legislature

At the time of the passage of the act of 1813, and for many years afterward, nearly all of the physicians in New York State practised in accordance with the theories and precepts of what is now called the regular or allopathic school of medicine. That act provided that the physicians in the respective counties of the State of New York should meet in the respective counties and organize county medical societies. As a consequence of the fact that the physicians of that day were chiefly of the allopathic school, they necessarily obtained the control of the county medical societies and State medical societies. Hence it became difficult, if not impossible, for physicians who wished to practise upon other theories and tenets than those obtaining in that school, to obtain licenses to do so. With the growth of the homœopathic school of medicine and the eclectic school of medicine, came applications to the legislature asking for those practising the methods of those schools the same rights and privileges of organizing county and State societies as had been extended to physicians generally by the act of 1813; so that in 1857, by Chapter 384, the legislature of New York State enacted that the homœopathic physicians might meet in their respective counties and organize county medical societies, with boards of censors having the same powers and privileges which were granted by the act of 1813; and by other laws similar privileges were granted to the so-called eclectic school. After the passage of the act of 1844, down to about 1874, as hereinbefore stated, there was no limitation upon the right to practise medicine or surgery in this State.

The inharmonious and injurious effect of such policy in the State becoming manifest, the legislature, by Chapter 436 of Laws of 1874, required all persons desiring to practise medicine or surgery to obtain a certificate as to their qualifications from the censors of some one of these medical societies. By the Laws of 1880, Chapter 513, additional and more extensive and particular provisions were made in reference to this matter, and all the physicians then practising were required, on or before the time limited in the act, to file with the county clerks of their respective counties their licenses to practise granted by the censors of their county medical societies, or a diploma of some

had made every man a doctor, and nostrums of every description and admixture could now be safely prescribed, and payments therefor exacted by authority of law."

chartered school of medicine; and those persons who desired to become licensed who were not in practice were likewise required to obtain similar licenses or certificates and file the same. A diploma of a chartered school or medical college was given the same effect as a license issued by the censors.

By Chapter 468, Laws of 1889, and 499 of 1890, which have reference to the qualifications of persons becoming medical students, and Chapter 507 of 1890, which gave to the Regents of the University of the State of New York power to select boards of examiners from persons nominated by each of the three State medical societies, viz., the New York State Medical Society, Homœopathic Medical Society, and Eclectic Medical Society; which enactments are now embodied in Chapter 101 of Laws of 1893, known as "The Public Health Law," and its amendments, a complete code for the license and regulation of the practice of medicine and surgery has been provided. These provisions are synopsized below, p.

Penal Provisions in New York State.—The New York Penal Code, which went into effect in 1882, enacted that a person practising medicine or surgery, or pretending to be a physician or surgeon, without a license or a diploma from some chartered school, should be deemed guilty of a misdemeanor punishable by fine or imprisonment (Penal Code, Section 356[1]); and the same statute, 357, made it a misdemeanor for a person, whether licensed or not, to practise medicine or surgery, or do any other act as a physician or surgeon, while intoxicated, by which the life of any person is endangered or his health seriously affected.[2]

Giving "Patent Medicine" No Exception.—At one time

[1] Notwithstanding these statutory enactments, it has been held that one who undertakes to cure disease by rubbing, kneading, pressing, and otherwise manipulating the body (massage) is not liable for having violated the provisions of the statute against practising medicine or surgery without a license. Smith *v.* Lane, 24 Hun (New York Supreme Court), 32. The soundness of the decision in this case when applied to cases in which it appears that the masseur (body manipulator) attempts to diagnose the symptoms of the patient, is quite questionable. We are confident that it will be, as it should be, limited to the exact state of facts upon which it was rendered.

[2] In People *v.* Hawker (152 N. Y., 254), the New York Court of Appeals held that the provisions of Section 140 of the Public Health Law of that State, forbidding any person who had been convicted of a felony to practise medicine, were constitutional, although the conviction occurred before the law was enacted.

an attempt was made to claim that under the patent laws of the United States a person had the right to administer patent medicines without being punishable for practising without a license, but this doctrine was repudiated by the courts. Thompson *v.* Staats, 15 Wend., 395; Smith *v.* Tracy, 2 Hall (N. Y. Superior Ct. Rep.), 465; Jordan *v.* Overseers, etc., 4 Ohio, 295.

Courts may Compel Granting of License.—A person who is qualified and complies with reasonable rules of a licensing body, can compel such body to license him. This was held to be the law in the case of The People *ex rel.* Bartlett *v.* The Medical Society of the County of Erie, which is also an important authority in respect to a vexed question of medical ethics. It appeared in that case that under the general laws of New York in regard to the organization of medical societies, a medical society had refused to receive as a member a person otherwise qualified, because he had advertised in the public prints a certain cure, including a mechanical appliance used in treating throat troubles; it being forbidden by the code of ethics of the American Medical Association, which the County Medical Society had adopted as one of its by-laws, that a physician or surgeon should advertise. The Court of Appeals of the State of New York held that this constituted no defence to a proceeding instituted by such person to obtain a mandamus compelling the society to admit him to membership, if otherwise qualified.[1]

[1] Analysis of this decision shows that the main ground, upon which the court of last resort sustained the right of the applicant for admission to be admitted as a member of the society, was, that the provisions of the by-law in question were not specifically made applicable to a person applying for membership. The Court observed, pp. 192 *et seq.*: "The regulations embodied in the so-called code are admirably framed, and commend themselves to every reader, as tending to raise to a still higher elevation the character of the learned and honorable profession to which they were submitted for approval and adoption. They are not limited in their scope to the range of moral obligation, but embrace express rules of conduct, in personal, professional, and public relations. They are regulations in the various departments of morals and manners, of courtesy and etiquette, of delicacy and honor. They bind those who pledge themselves to their observance, but cannot be recognized in law, as conditions precedent to the exercise of an honorable profession, by learned, able, and upright men, who have not agreed to abide by them. The non-observance of such regulations *may be made* cause for exclusion or disfranchisement; but it must be either by the agreement of parties or by the exercise of the law-making power.

"The applicant was not a member either of the American Medical Association or of the Erie County Medical Society, at the time of his

It has also been decided that a medical society had no right to make a by-law establishing a fixed fee-bill, or tariff of charges, and providing for the expulsion of a member charging at a different rate than that prescribed. Such a by-law was declared unreasonable and void in the case of People *v.* Medical Society of Erie County, 24 Barb., 570.

It was attempted in that State to avoid the effect of these decisions, so far as they affect the validity of by-laws, by Chapter 445 of Laws of 1866, by which it is expressly enacted that the county medical societies of the State of New York may make such rules and by-laws as they see fit, "not inconsistent with the laws of said State, and may enforce them by expulsion or other discipline." It may be considered doubtful whether this legislation can accomplish its purpose in the case of the adoption of a by-law void as against public policy.

No Particular Schools Recognized by the Courts.—The general trend of the decisions in all the States, whenever

alleged deviation from the formulas prescribed by these conventional rules. He was under no legal obligation to observe them, and had neither actual nor constructive notice of their existence. Those who were *members* of the society could not lawfully be expelled for *antecedent* deviation from the code (Fawcett *v.* Charles, 13 Wend., 477). Much less could such deviation be alleged, as cause for exclusion, against one who had never agreed to be bound by it, and as to whom it was not merely an inoperative but an unknown law.

"As the relator demanded admission to the enjoyment of a franchise to which he was presumptively entitled, his exclusion could be justified only by facts repelling the presumption that he was duly qualified for admission, or by extraneous facts, showing that, if his application was granted, there were then subsisting causes, making 'a clear case' for immediate expulsion (*Ex parte* Paine, 1 Hill, 665).

"The burden was upon the appellant to establish affirmatively the existence of such present cause for expulsion. The society waived the right of making a return and taking a formal issue on the claim of the relator, to be determined as matter of fact by a jury, under the direction of the court; but submitted its objections in the form of affidavits, which failed to establish cause either for exclusion or expulsion.

"The only *specific fact* alleged in the opposing affidavits, as ground of objection, was the publication by the relator of a professional advertisement, which was inserted in one or more of the Buffalo journals in May, 1855, and discontinued in January, 1857, more than two years before his application was presented. It is charged that the printing of this notice was an empiricism, and in conflict with the code of ethics adopted by the Erie County Medical Society.

"There is nothing in the terms of the advertisement from which any inference can justly be drawn against the relator, in respect either to his personal character or his professional skill. There is no suggestion, in the affidavits, that any of the statements of fact contained in the notice are untrue, and there is nothing in its contents inconsistent with perfect good faith on the part of the relator. It refers to the

any questions in reference to schools of medicine have been before our courts, is to avoid recognizing any particular system or school. The theory of the New York courts upon this subject is well expressed by the liberal-minded and learned Judge Daly in the New York Court of Common Pleas, in the case of Corsi *v.* Maretzek, 4 E. D. Smith, 1–5. In that case it was claimed that a certificate of incapacity because of sickness, given by a "homœopathic" physician to an opera-singer, was not binding. It was argued that the employment of a "homœopathic" physician under the contract did not fulfil a provision thereof which required the event of the singer's sickness to be certified to by "a doctor," to be appointed by the director.

The Court said: "The system pursued by the practitioner is immaterial. The law has nothing to do with particular systems. Their relative merit may become the subject of inquiry, when the skill or ability of a practitioner in any given case is to be passed upon as a matter of fact. But the law does not, and cannot, supply any positive rules for the interpretation of

treatment of bronchitis, asthma, and consumption, as a special department of the profession to which he had directed his particular attention; and it alludes to his use of the method recently introduced, of medicated inhalation, through an instrument appropriate to that purpose, in aid of such general treatment as experience had proved to be beneficial in that class of diseases. It is not denied that the relator possessed peculiar skill in this department of the profession; and the case discloses the fact that the method of auxiliary treatment, introduced by him in the county of Erie, was not only successful in his own practice, but was adopted, with beneficial results, by members of the county society of high professional standing, and that it was accepted by a large proportion of the physicians of Western New York. If, at the time this remedy was introduced, he had been a member of the County Society or of the American Medical Association, he would not have been at liberty to direct attention, through the medium of the public journals, to the benefits resulting from its use. This would, perhaps, have been unfortunate for those who were suffering, in that vicinity, from this particular class of diseases; but it is undoubtedly true that the suppression of such an advertisement would have been more considerate toward his professional brethren, and more in accordance with the rules of delicacy and good taste. But an error, in this respect, by one who had no notice of the society regulation is not cause for disfranchisement. The act of the relator was neither immoral nor illegal. It was no violation of the by-laws; for, as to him, they were wholly inoperative. It was no present cause for *exclusion;* for the publication of the objectionable notice had been discontinued for more than two years. When he applied for admission, he proposed to become bound by the by-laws; and this the society refused to permit, for the sole cause that he had not observed them before they became rules of conduct for him. 'Where there is no law, there is no transgression.' The relator, therefore, had been guilty of no legal wrong which could bar his claim to the franchise."

medical science. It is not one of those certain or exact sciences in which truths become established and fixed, but is essentially progressive in its nature, enlarging with the growth of human experience, and subject to those changes and revolutions incident to any branch of human inquiry, the laws of which are not fully ascertained. The labors of the anatomist, the physiologist, and the chemist have contributed an immense storehouse of facts; but the manner in which this knowledge is to be applied in the treatment and cure of diseases has been, and will probably continue to be, open to diversity of opinion. No one system of practice has been uniformly followed, but physicians from the days of Hippocrates have been divided into opposing sects and schools. The sects of the dogmatists and the empirics divided the ancient world for centuries, until the rise of the methodics, who, in their turn, gave way to innumerable sects. Theories of practice, believed to be infallible in one age, have been utterly rejected in another. For thirteen centuries Europe yielded to the authority of Galen. He was implicitly followed—his practice strictly pursued. Everything that seemed to conflict with his precepts was rejected; and yet, in the revolutions of medical opinion, the works of this undoubtedly great man were publicly burned by Paracelsus and his disciples; and for centuries following, the medical world was divided between the Galenists and the Chemists, until a complete ascendency over both was obtained by the sect of the Vitalists. This state of things has been occasioned by the circumstance that medical practitioners have often been more given to the formation of theories upon the nature of disease and the mode of its treatment, than to that careful observation and patient accumulation of facts, by which, in other sciences, the phenomena of nature have been unravelled. I am far from undervaluing the great benefits conferred upon mankind by the study of medicine, and have no wish to minister to any vulgar prejudice against a useful and learned profession, but it is not to be overlooked that, as an art, it has been characterized, in a greater degree, by fluctuations of opinion as to its principles and the mode of its practice, than, perhaps, any other pursuit. That it has been distinguished by the constant promulgation and explosion of theories, that it has alternated between the advancement of new doctrines and the revival of old ones, and

that its professors in every age have been noted for the tenacity with which they have clung to opinions, and the unanimity with which they have resisted the introduction of valuable discoveries. They still continue to disagree in respect to the treatment of diseases as old as the human race; and at the present day, when great advances have been made in all departments of knowledge, a radical and fundamental difference divides the allopathist from the followers of Hahnemann, to say nothing of those who believe in the sovereign instrumentality of water.

"In fact, nothing comparatively is known of the philosophy of disease. Its eradication or cure, where the result of human agency is, in the great majority of instances, attributable rather to the careful observation, judgment and experience of the particular practitioner, than to the application of general or established methods available to all. The popular axiom, that 'doctors differ,' is as true now as it ever was, and as long as it continues to be so, it is impossible for the law to recognize any class of practitioners, or the followers of any particular system or method of treatment, as exclusively entitled to be regarded as doctors. In adverting to the conflicting views and differences of opinion, that exist and have ever existed in the practice of the healing art, it is not to call in question the value of learned, skilful and experienced physicians, but merely to show the error of attempting, in the present state of medical science, to recognize, as matter of law, any one system of practice, or of declaring that the practitioner who follows a particular system is a doctor, and that one who pursues a different method is not." And see also White *v.* Carroll, 42 N. Y., 161; Ordronaux' "Jurisprudence of Medicine," 27.

This decision was prior to the statute of 1874 and the provisions of the Penal Code before noted. Since those statutes, it is a misdemeanor to practise except as permitted by the provisions of those statutes.

In New York and Elsewhere Practitioner Without License Cannot Sue and Recover for His Fees.

Since the passage of the New York Act of 1844 (Laws of 1844, p. 406), there has been no precise statutory provision in that State prohibiting in terms persons who practise physic or

surgery without a license, from suing to obtain a recovery for services performed. But this is of little consequence, for, as we have already stated, so practising has been declared to be a misdemeanor by the Penal Code of New York.

It is a well-settled principle that when any act is declared by statute to be criminal, a contract calling for the performance of such an act is illegal and void. The early English authorities on this point are fully collated in Wheeler *v.* Russell (17 Metc., Mass., 258), and the later English and American cases may be found in "American and English Cyclopædia of Law," title "Contracts," Vol. III., p. 872 *et seq.*; see also *id.*, Vol. XVIII., p. 440.

In a suit between a person who has performed medical and surgical services, and one who employed him, it is said that the person performing the services is presumed to have been licensed to do so.[1] If the State sues for a penalty, a different rule is claimed to prevail.[2]

[1] In Macpherson *v.* Cheadell (24 Wend., N. Y., 15) the Court said, p. 24:

"In the first place I doubt much whether the defendant below, after retaining the plaintiff as a physician and accepting his services as such, could call upon him in the first instance to prove a regular license. In other like cases, the presumption is against the defendant. It is so as between attorney and client, in a suit for services performed under a retainer. Pearce *v.* Whale, 7 Donl. & Ryl., 512, 515, per Bayley, Judge; 5 Barn. *v* Cress., 38, S. C. There, if the objection sound in the fact that the plaintiff was never admitted, or that his admission has become inoperative, it lies with the defendant to show it. *Id.*, and see Berryman *v.* Wise, 44 T. R., 566, and other cases; 1 Phil. Ev., 227. Cowen *v.* Hill's ed. Besides, the contrary would be doing great violence to the presumption that no man will transgress the command of a positive law." See also Thompson *v.* Sayre (1 Denio, N. Y., 75), where this principle seems to have been assumed as correct without question upon the strength of the decision quoted above. A similar doctrine appears to have been enunciated in the State of Illinois in Chicago *v.* Wood, 24 Ill. App., 42; and Williams *v.* People, 20 Ill. App., 92. It may be sound, and undoubtedly the English cases cited in Macpherson *v.* Cheadell, *supra*, tend to support it. But in a case in which the physician's right to practise is denied, the safe course will be for him to have a duly authenticated copy of his license ready to be offered in evidence. The general rule is that the burden is on the plaintiff to show all the facts which make up his right of recovery. See Bliss *v.* Brainard, 41 N. H., 256; Salomon *v.* Dreschler, 4 Minn., 278; Kane *v.* Johnston, 9 Bosw., N. Y. Superior Ct., 154.

[2] That is, the burden devolves upon the defendant, and this notwithstanding the presumption of innocence, of showing what must be peculiarly within his own knowledge, namely, that he has been duly licensed. People *v.* Nyce, 34 Hun (N. Y.), 298, and cases cited; People *v.* Fulda, 52 Hun, 65; 1 Greenleaf on Ev., § 79, and cases cited. See, contra, State *v.* Evans, 5 Jones, N. C., 250.

How may a Diploma or License be Proved in a Court of Law?

It is evident from the foregoing considerations that in any proceedings to punish for practising without license or legal authority, and in actions to recover payment for professional services in the States and countries, where a license or diploma of a regularly chartered school or college is required by statute to entitle the person to practise, it may become important to establish—first, the legal authority to grant the license or diploma; and second, the genuineness of the license or diploma produced. It frequently happens that the diploma or license has been obtained in another State or country. Under the New York statutes, especially the laws of 1880 and 1890, it was made necessary to file a diploma. When it had been issued by a chartered school of another State it must be certified to by some lawfully incorporated medical college in this State, before being received for filing, or regarded by the law as conferring upon its possessor the right to practise in this State.

As to the chief element of authenticity, namely, the legal incorporation or authority of the body or institution granting the diploma, it is clear that the act of incorporation itself would be the best evidence of the incorporation of the college or school, and a special act granting the power to license to a board of censors or other official body or board would have to be produced to show the right vested in that board or body to grant a license. In Georgia it has been held (Hunter *v.* Blount, 27 Ga., 76), that to prove a diploma given to a physician in another State, the existence of the college, and the fact of its being a chartered institution, must be shown by producing its act of incorporation. To same effect is the case of People *v.* Nyce, 34 Hun (N. Y.), 298, 299, 300.

In Thornton's case (8 Term Rep., 303; same case, 3 Esp., 4), it was held that the mere production in court of a diploma under the seal of one of the universities, is not of itself evidence to show that the person named in the diploma received the degree which the diploma specified. In another and later case, however, Simpson *v.* Dunmore (9 M. & W., 45; same case, 5 Jurist, 1012), it was held that it was unnecessary for the person producing a license from the Apothecaries' Com-

pany (an incorporated body) to practise as an apothecary, the seal on which license was proved to be genuine, to give any additional evidence of his identity with the person named in the license. The reason for this doctrine is probably to be found in the well-known rule of evidence, that identity of both christian name and family name, is sufficient to raise a presumption of fact that the person bearing the name is the identical person so named in any written instrument.

In Walmsley *v.* Abbott (1 K. & P., 309; same case, 5 D. & R., 62), proof of the signature of one of the examiners who signed a certificate of examination was held sufficient to warrant the acceptance of the certificate in evidence in the first instance. In another case the proof was that a person previously a stranger to the place went to a town which was the seat of a university, and was told that a certain building was the college, and that a certain person whom he saw there was the librarian, and that this librarian showed him what purported to be the seal of the university, and also a book which the librarian stated was the book of acts or records of the university, and the seal so shown him was compared with the seal of a certain diploma, the genuineness of which was in question, and a copy was made from the said book of acts, of an entry stating that the degree of M. D. had been conferred by the university upon a person bearing the same name as that in the diploma, and this proof was held a sufficient authentication of the diploma, and of the act or authority of the university conferring the degree. Collins case, 1 Addison & Ellis, 695; same case, 3 N. & M., 703.[1]

The Rule in Criminal Prosecutions.—We have seen above, that in a criminal prosecution the burden is on the defendant to produce and prove his license, but to warrant a conviction for

[1] In Finch *v.* Gridley's Executors (25 Wend., N. Y., 469–471), Nelson, Ch. J., said: "I am also inclined to think the evidence which was given competent to prove the *diploma* from Fairfield College. The witness identified the corporate seal, *and had himself received a diploma from that institution subscribed by the same president and secretary.* Though he did not actually see them subscribe the paper, he had every means of becoming acquainted with their signatures; *the delivery* of it to him was an acknowledgment they had signed it. Besides, he was familiar with diplomas from the institution under their signature," etc.

And see, also, Raynor *v.* State, 62 Wis., 289; Wendel *v.* State, *id.*, 300.

practising without a license it must be shown that the accused actually *practised*. It is not enough to show that he is called by persons whom he attends personally, that is, for whom he prescribes, or to whom he gives medicine or whom he treats. There must be proof shown that he has done this on his own account or for his own profit. But proof of a single act connected with other circumstances, such as tend to show that he held himself out as a physician, is enough. Burham *v.* State, 116 Ind., 112; Hill *v.* Bodie, 2 Stew. and P. (Ala.), 56; Pedgrift *v.* Schiller, 8 C. B., N. S., 200 (same case, 6 Jurist, N. S., 1341). And if he simply practises "massage," he does not fall within the acts against practising medicine, even though he pretends to accomplish as much good as could have been accomplished by a regular physician. Smith *v.* Lane, 24 Hun, N. Y., 632. But see also Leech *v.* Ripon, 12 Cent. L. J., 479; State *v.* Schultz, 11 Reporter, 701.[1]

Falsely Pretending to be a Licensed Practitioner Generally a Misdemeanor.—In some of the States, and in England, it is not only made a misdemeanor to practise without a license, but falsely pretending to be a licensed practitioner is made a misdemeanor. Such is the provision of the Penal Code of New York heretofore cited. In England such a statute has been somewhat strictly construed in the case of Carpenter *v.* Hamilton (37 Law Times Rep., 157). In that case it appeared that a person advertised himself as "John Hamilton, M.D.," of the "Metropolitan Medical College of New York." It further appeared that he was not registered as required by the law of England. In a prosecution against him for falsely pretending to be a licensed physician, the only proof of his practising being

[1] In some of the States, persons who simply administered roots and herbs in treating disease, have been excepted from that portion of the statute which forbids the practice of medicine and surgery without a license. The proper construction of such an exception is, that it is a question of fact for the jury, whether the person accused who claims the benefit of the exception, simply administered a concoction of roots and herbs within the meaning of the statute, or whether, under the guise of so doing, he really held himself out as and acted as a regular practitioner. All such penal statutes are to be construed, like all other penal statutes, with due regard to the rights of the individual, and at the same time with such degree of liberality as will tend to preserve the public safety. And see criticism of the case of Smith *v.* Lane in note 1, p. 13 *supra*.

as just stated, an acquittal was sustained by a majority of the court, which held that it was a question of fact to be determined by a trial court whether or not what he did was *pretending* to be a physician authorized to treat a patient. The Court intimated that the person simply pretended to be what he really was, namely, a doctor of medicine of the Metropolitan Medical College of New York.

State and Local Boards of Health—Powers Governed by Special Statutes.

In addition to the rules and regulations prescribed by the general statutes, modern sanitary science has developed so broadly throughout most of the civilized states and countries, that the different governments have established state boards of health, and in many instances local boards of health, the latter being limited in their authority and operation to specific municipal divisions, to which boards the government has committed the power to pass certain sanitary rules and regulations, which rules and regulations may have an important bearing upon and relation to the practice of medicine and surgery. The jurisdiction and powers of these boards are to be found in the special statutes creating them, and prescribing their powers and duties, and cannot be treated of extensively here. They are considered further under the special subjects to which they relate.

Physicians Bound to Report Contagious Cases and Not Liable for Mistaken Report.—The duty promptly to report[1] to

[1] It has been held that the act of a physician in reporting to a health-board in good faith that his patient is suffering from small-pox, is not actionable. Brown *v.* Purdy, 8 N. Y. St. Rep., 143. The Court said (per Sedgwick, J.): "In order to give the public the protection due to it, according to the intention of the statute, any physician that possesses in fact an opinion that a patient has a contagious disease, is bound to report the case, *whether he has* or *has not* used ordinary professional skill and knowledge. A physician of skill in everything but cases of small-pox, which happily are not numerous, may, unexpectedly to himself, be called to a case which presents to him the appearance of small-pox. It may be said that he may call in counsel. It cannot, however, be said that private counsel should be called in rather than such as the law has appointed. Certainly, if he really thinks the case to be one of small-pox, it is his duty to communicate his opinion to the public authorities, who furnish skilled physicians peculiarly competent to pass upon the case. They are the experts the law points out for the physician. The attendance of these experts upon a patient can cause no injury, and thereafter the responsibility rests solely upon the public officer."

As to how far the decision of an

boards of health every case of contagious or infectious disease is manifest.

inspector appointed by a board of health is regarded by the law as quasi-judicial, and therefore conclusive, see Underwood *v.* Green, 42 N. Y., 140; Raymond *v.* Fish, 51 Conn., 80. Health officers who were guilty of gross negligence in removing infected persons from a city in stormy weather, and putting them in an unprotected and unsafe structure, so that such persons died from the exposure, have been held liable. Aaron *v.* Broiles, 64 Tex., 316.

The latest and most complete statute laws creating or regulating health boards are: England, 38 and 39 Victoria, chap. 55; United States (National Board of Health), 20 Stat. L., 484, suppl. to U. S. Rev. Stats., chap. 202, passed March 3d. 1889; Mass., chap. 79, Mass. Rev. Stats.; Pa., Laws of 1885, chap. 56; N. Y., Public Health Law, chap. 101 of Laws of 1893. The statutes of New Jersey are considered in Lozier *v.* Newark, 19 Vr., 453. In Missouri the power to license physicians is conferred upon the State Board of Health, and the Supreme Court of that State has held that the act of that board in granting or refusing a license is discretionary and its action in such a matter will not be enforced by a writ of *mandamus* (State *v.* Gregory, 83 Mo., 123); and a similar doctrine prevails in Minnesota, State *v.* State Med. Board, 32 Minn., 324.

CHAPTER III.

OF THE CONTRACTUAL RELATION BETWEEN PHYSICIAN AND PATIENT.

Employment and Rights in Regard to Compensation.

Legal Character of the Employment.—Whatever may have been the theories of the Roman civil law, and following it of the early English common law, as to the character of the employment of physicians and other professional men, it is now so well settled that the reciprocal duties and obligations arising between physician and patient, or attorney and client, and the like, are to be classed under and governed by the law of contracts, that any extended discussion of these theories is unnecessary here.[1] Mr. Ordronaux, in the second chapter of his interesting work on the "Jurisprudence of Medicine," has considered them fully, and has quoted amply from the books of the earlier and later text-writers, and from the expressions of the judges, to show what these theories and rules were; and he and all later authorities agree that the ancient notion, that professional services are always gratuitous unless a special contract to pay for them is made, has long been abandoned. He observes (pp. 13 and 14): "But in our day the increase in the number of professional practitioners, and their exclusive devotion to a special class of services as a means of living, has essentially modified the practical character of the contracts with their patrons. Although in legal acceptation a mandate, yet from force of circumstances growing out of an altered state of society, the *mandate* is practically changed into a contract of hire (*locatio operis*). *This doubtless reduces professions to the status of artisanship*, and places them on a par with manual labor, conjoined to the special skill of a particular calling. But it also simplifies the contract, removes it from the category of innominate or imperfect obligations, requiring the

[1] Consult, as to this, Parsons on "Contracts," vol. ii., p. 56.

intervention of legal fictions to furnish a means for their enforcement, and brings it within the pale of consensual agreements based upon a sufficient consideration."

The physician's right to sue on contract in England was declared by legislative enactment by Chap. 90 (Sec. 31), 21 and 22 Victoria. It has never been denied in the United States. Adams *v.* Stephens, 26 Wend., 451–455.

Physicians' and Surgeons' Service in a Sense Voluntary.—Though it is true, as in the case of many other doctrines of ancient law which were formulated under social conditions far different from those which prevail in modern times, that these rules and theories have long since lost their potency as distinct rules governing actions at law, nevertheless the legal aspect of the peculiar relationship between physician and patient is still affected by the idea that the service on the part of the physician is voluntary—that is, the physician or surgeon is not bound to come and perform services whenever or wherever he is called. He is at liberty to refuse any and every patient who attempts to employ him.

Patients may Cease Employing at Any Time, unless there is a Contract for a Certain Period.—And when he is employed, the patient may at any moment discharge him, without incurring liability in damages, unless a special contract has been entered into between them that the services shall be rendered for a fixed period.

Service once Begun by Physician must be Continued until Notice of Intention to Cease is Given by Him.—If, however, the services are begun, they must be continued until notice has been given of the intention to discontinue them, and a reasonable time allowed the patient to obtain the services of another person. The reasons for this rule will be considered more fully below.

Contract either Express or Implied.—The contract between the physician and patient may be an express one, that is, one in which all the terms are agreed upon or *expressed* between the parties, or it may be what is called an implied contract, or one in which the patient, or another person, simply calls on the physician or surgeon to come and perform services, and neither party specifically stipulates or agrees upon any of the terms of the employment.

Express Contracts may Include any Stipulation Not Contrary to Public Policy.—In the case of an express contract the agreement of the parties settles and determines their mutual obligations, whether it be written or merely verbal. And an express contract may also be made in such a form that certain conditions are required to be performed by the physician before he becomes entitled to any compensation for his services. It may also embody an agreement that the patient shall pay certain sums at certain times as the treatment goes on, or that no other physicians shall be employed without the consent of the attending physician, or if so employed that they shall be under the direction of the attending physician.

Almost anything may be stipulated which is not contrary to public policy, and a breach of any such stipulation entitles the aggrieved party to rescind the contract and cease from performing it.[1]

Qualifications of the Rule that Express Contracts may Include any Stipulation.—Some qualifications of this rule of law must, however, be noted. A breach by the patient of any one of these stipulations would entitle the physician to treat the engagement as terminated like any other contractual relation, and to bring his action for a recovery for services rendered up to the time of the breach; but it is doubtful whether he would have any action for damages for failure to permit him to perform further services. This doubt arises from the legal doctrine, hereinbefore referred to, that a patient is always at liberty to dismiss his physician at any time without notice, and without assigning any cause, which recognizes and grows out of the fact that if the trust and confidence of the patient are destroyed, or impaired, no matter how unreasonably or unjustly, the relation between them must thereafter be unprofitable to both parties, and dangerous to the patient. On the other hand there is little doubt that whenever an express contract is made by a physician to treat a patient for a certain length of time for a particular disease or injury, the physician is not at liberty arbitrarily to terminate that relation or his connection

[1] Of course in those States or countries where statutes of fraud render void all contracts for personal services for a longer period than one year (or any period named in the statute) which are not in writing and duly signed, contracts should be drawn and entered into with regard to those statutes.

with the case, unless he has in the contract specifically reserved the right so to do.

Contracts Making Payment Contingent upon Successful Treatment Valid.—The express contract between the parties may also contain a stipulation, by which the physician makes his compensation contingent upon his effecting a cure. Smith *v.* Hyde, 19 Vt., 54; Mack *v.* Kelly, 3 Ala., 387. See also Coughlin *v.* N. Y. Cen. R. R. Co., 71 N. Y., 443. In such a case, however, if the patient does not permit the physician opportunity to treat him during the time named in the contract, or for a reasonable time, if no specific time is fixed, the courts would probably permit the physician to recover a reasonable compensation for his services for the time during which he treated his patient.

Physician must Allow Reasonable Time to Supply his Place if he Quits his Patient.—In any event, whether the contract be express or implied, conditional or unconditional, the law, through motives of public policy and with a just regard for the welfare of the sick and injured, undoubtedly requires that if a physician has once taken charge of a case, and determines to abandon it, he must give the patient reasonable notice and reasonable opportunity to supply his place. If he fails to do this he is liable in damages for the results that follow as the proximate consequence of his abandoning the case.

This Rule True even in the Case of a Charity Patient.—This is true, it is believed, even when the patient is a charity patient, and the services are gratuitous. Shiels *v.* Blackburn (1 H. Blacks., 159). For any other rule less strict might entail the most serious consequences. Ordronaux, "Jur. of Med.," 13 and 14, citing Inst., lib. 3, 26, 11; Pothier, "Du Contrat Mandat," Chap. I., § 4.

Elements of the Contract Between Physician and Patient.

Duties of Physician.—When the relations between physician and patient are not defined otherwise by express contract, the implied contract is, and the law presumes, that the physician contracts, first, to use the necessary care and attention;

second, to use the necessary skill; third, in case the physician furnishes his own medicines (and the obligation to furnish them would probably be imposed, if it was the custom of the school or class of physicians to which the particular physician belonged to do so), that the medicines are proper and suitable. As a corollary of these duties it necessarily follows, also, that the physician contracts that the instruments or appliances which he uses are free from taint or contagion, and are suitable and proper for the uses to which they are put. Upon this theory an action could be maintained against a physician for using impure vaccine.

Duties of Patient.—The patient on his part contracts, first, to give the physician information concerning the facts and circumstances of the case, and full opportunity to treat him properly; second, to obey his instructions and follow his directions, and, third, to pay him the reasonable worth and value of his services. The different branches of this contract are reciprocal. The failure of either party to fulfil the obligation of any one of them which is imposed upon him, and will affect his remedies against the other party to recover damages for any breach, or any proximate result of his breach, of such obligations. The necessary care and attention required of the physician in such a case are measured by the requirements of the case and the physician's duties to his other patients, modified, however, by the rule that the physician is presumed to know, at the time he takes up the case, the condition and situation of his other patients at that time. Consequently, if those who have first employed him are so situated at the time that his services for them are likely to be soon and continuously required, he cannot without making himself liable in damages undertake another case and then neglect it, but he should either decline to take it, or should with the full knowledge and consent of the patient make provision for the temporary substitution of some other physician, during the time that his prior obligations engross his attention.[1] Nevertheless, if the situation and condi-

[1] If he is represented by an assistant, he is liable for the assistant's want of skill. Fish *v.* Welker, 7 Ohio N. P., 472. But it seems that if the service of the substituted physician is accepted not as representing the one first employed, but under an independent contract, and damage results from his want of skill, the patient cannot recover such damage of the first physician. Myers *v.* Holborn (N. J. Ct. of Err. and App.), N. J., s. c., 33 Atl. Rep., 389. Same principle, Keller *v.* Lewis, 65 Ark., 578; s. c., 47, S. W., 755.

tion of those to whom he had first contracted his services were such that he had (although he exercised due professional knowledge and skill) no reason to apprehend that these patients would need his exclusive service; and if by a sudden development, arising from those occult causes which obtain in all serious diseases and injuries, any of his prior patients suffered a sudden and dangerous relapse, or an accession of new and dangerous symptoms and conditions so that he must fly to their aid, he would not be liable to another patient, to whom he had afterward contracted his services, for neglecting his case. Still he should in such instances use extra means to obtain the services of some other and equally skilful man.

Only Ordinary and Usual Skill Required.—The degree and character of necessary skill contracted for has been variously defined by the courts. When malpractice is discussed, a more extended consideration of this matter will be required. At present the doctrine laid down in Shearman and Redfield on "Negligence," paragraphs 433–435, may be adopted. It is as follows:

"Although a physician or surgeon may doubtless by express contract undertake to perform a cure absolutely, the law will not imply such a contract from the mere employment of a physician. A physician is not an insurer of a cure, and is not to be tried for the result of his remedies. His only contract is to treat the case with reasonable diligence and skill. If more than this is expected it must be expressly stipulated for. . . . The general rule, therefore, is, that a medical man, who attends for a fee, is liable for such want of ordinary care, diligence or skill on his part as leads to the injury of his patient. To render him liable, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. . . . But a professed physician or surgeon is bound to use not only such skill as he has, but to have a reasonable degree of skill. The law will not countenance quackery; and although the law does not require the most thorough education or the largest experience, it does require that an uneducated,

ignorant man shall not, under the pretence of being a well-qualified physician, attempt recklessly and blindly to administer medicines or perform surgical operations. If the practitioner, however, frankly informs his patient of his want of skill, or the patient is in some other way fully aware of it, the latter cannot complain of the lack of that which he knew did not exist." [1]

Average Standard of Skill of any Professed School must be Attained.—It is also a rule that one who professes to adhere to a particular school must come up to its average standard, and must be judged by its tests, and in the light of the present day. Thus a physician who would practise the reckless and indiscriminate bleeding which was in high repute not very many years ago, or should shut up a patient in fever and deny all cooling drinks, would doubtless find the old practice a poor excuse for his imbecility. So, if a professed homœopathist should violate any of the important canons of homœopathy, he would be bound to show some very good reasons for his conduct, if his violation was attended with injurious effects. Upon many points of medical and surgical practice all of the schools are agreed, and indeed common sense and universal experience prescribe some invariable rules, to violate which may generally be called gross negligence. Yet the patient cannot justly complain if he gets only that quality and kind of service for which he bargains. If he employs a cheap man, he must expect cheap service. Puffendorf, in his "Law of Nature and Nations," observes: "We read a pleasant story of a man who had sore eyes and came to a horse-doctor for relief. The doctor anointed his eyes with the same ointment he used among his horses, upon which the man fain blind, and the cause is brought before the judge, who acquits the physician. For if the fellow, says he, had not been a[illegible]ss he had never applied himself to a horse-doctor." See

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12. Connecticut, Landon *v.*
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Maine, Leighton *v.* Sargeant,
e. (7 Fost.), 468; Howard *v.*
Grover, 28 Me., 97. Illinois, MacNevins *v.* Lowe, 40 Ill., 209. Kansas, Teft *v.* Wilcox, 6 Kan., 46. Massachusetts, Com. *v.* Thompson, 6 Mass., 134; Small *v.* Howard, 128 Mass., 131, 35 Am. Rep., 363. Pennsylvania, Potter *v.* Warner, 91 Pa. St., 362, 36 Am. Rep., 668. Wisconsin, Reynolds *v.* Graves, 3 Wis., 416. Vermont, Briggs *v.* Taylor, 28 Vt., 180. And see cases cited below under Malpractice.

also Jones on Bailments, 100; 1 Field's "Lawyers' Briefs," sub. Bailments, Sec. 573; Musser *v.* Chase, 29 Ohio St., 577; Lanphier *v.* Phipos, 8 Carr. & Payne, 478.

Degree of Care and Skill Used a Question of Fact.—In an action at law, whether brought by a physician to recover for his services, or by a patient to recover for malpractice or neglect, it is always a question of fact, to be determined by the jury under proper instructions as to the measure of care and skill required, whether or not the physician has in a given case used that degree of care and displayed that amount of skill which might reasonably be expected of him under the circumstances of the case. These same rules apply to the surgeon. He must possess and exercise that degree of knowledge and sense which the leading authorities have announced, as a result of their researches and experiments up to the time, or within a reasonable time before, the issue or question to be determined is made.[1]

Rule in Leading Case of Lanphier v. Phipos.—In the case of Lanphier *v.* Phipos, 8 C. & P., 478, already cited, Chief Justice Tyndall enunciated the rule as to the degree of skill required of a physician or surgeon, which has been followed by all the courts since then. He said: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, if he is an attorney, undertake at all events to gain the cause, nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable and competent degree of skill. And in an action against him by a patient, the question for the jury is whether the injury complained of must be referred to a want of proper degree of skill and care in the defendant, or not. Hence he is not presumed to engage for extraordinary skill, or for extraordinary diligence and care. As a general rule, he who undertakes for a reward to perform any work is bound to use a degree of diligence, attention and skill, adequate to the performance of his

[1] See Shear. & Redf. on Negligence, 440; Elwell on Malpractice, 55; Carpenter *v.* Blake, *supra;* Rex *v.* Long, 4 C. & P., 422; Slater *v.* Baker, 2 Willes (Eng.), 259; Ordronaux on Jurisp. of Med. *passim;* 20 Am. Law Reports *v.* Honsinger, 155 N. Y. cases there cited.

undertaking; that is, to do it according to the rules of the art; *spondet peritiam artis.* And the degree of skill arises in proportion to the value and delicacy of the operation. But he is in no case required to have more than ordinary skill, for he does not engage for more."

Physician Must Instruct Patient how to Care for Himself, etc.—A corollary of these rules is, that the physician must give proper instruction to his patient how to take care of himself, how to manage a diseased or injured member, when and how to take any medicines that may be prescribed, what diet to adopt, and that in case the physician fails to give these instructions he is liable for any injuries that result from this failure. Carpenter *v.* Blake, *supra.*

Patient Must Inform Physician Fully Concerning his Case—His Communications Privileged.—On the other hand, as we have already stated, the patient owes the duty to his physician of informing him fully of all the varied symptoms of his disease, or the circumstances attending his injury, and freely and with due confidence to answer all questions concerning his past history which would tend to throw any light upon his present condition. To battle with the occult forces which play so important a part in determining the course or consequences of disease, it is absolutely essential that the physician should know all that is possible to be known of the patient's history, and of the history of the patient's family. As we shall see later on, all such communications are, in most of the States of the Union and elsewhere, by statutory enactment made privileged, and without the consent of the patient the physician or surgeon is absolutely forbidden to divulge any communication or information which he receives in order to enable him to prescribe.[1] This rule applies equally whether the physician or surgeon is acting for hire or is treating the person as a charity patient, and it has been extended by construction by the courts in some States so as to include examinations made by jail physicians or other physicians sent by the prosecuting officials of the State to examine a prisoner, for purpose of giving evidence, but who allowed the prisoner to suppose that they were there simply to treat him in their professional capacity. People *v.* Murphy, 101 N. Y., 126.[2] At the same time the courts have

[1] See article on Confidential Communications, page 93 of this volume.

[2] But see Griebel *v.* Brooklyn Heights R.R. Co., 68 App. Div. (N. Y.), 204, in which it seems to have

been careful to make an exception in the case of advice given for the purpose of enabling the person receiving the advice to commit a crime, and of any information received by the physicians while the persons asking for it were engaged in a criminal attempt. All of these interesting questions will be examined and treated of at length hereafter.[1]

Conditions of Contract Between Physician and Patient Further Considered.—It has been observed that the contract between the physician and patient may be conditional or unconditional. By this it is meant that limitations upon the reciprocal obligations between them may be imposed, or extensions of such obligations made, by special agreement. The physician may contract to cure, and may make the cure a condition precedent to receiving any reward for his services or medicaments, and a breach of such a contract will be enforced by the courts as a bar to an action for services rendered or medicines furnished. The patient may agree to come to the physician's home or to a hospital or other place agreed upon between them, for the purpose of being treated, or of being operated upon by a surgeon, and a failure to perform such an agreement on the part of the patient absolves the medical man from carrying out his agreement to treat the patient.[2] In the case already suggested of a request by the medical man for information as to the patient's past history, or that of the patient's family, or the circumstances concerning the injury or symptoms of the disease, if the patient should give false information, or should wilfully neglect to give true information, the physician would have a right, upon giving reasonable and due notice, and opportunity to employ some one else, as already

been held that a statement, made by a person injured in an accident, to one of the surgeons in charge of the ambulance, while it was transporting such person to the hospital, as to how the accident happened, is not privileged. And see also to same effect Griffith *v.* Met. St. Ry. Co., 171 N. Y., 106; Green *v.* Met. St. Ry. Co., *id.*, 201.

[1] On the points here suggested *cf.* Edington *v.* Life Ins. Co., 67 N. Y., 185; same case, 77 N. Y., 564; Grattan *v.* Life Ins. Co., 80 N. Y., 281; Dilleber *v.* Life Ins. Co., 87 N. Y., 79; Westover *v.* Life Ins. Co., 99 N. Y., 56; People *v.* Murphy, 23 N. Y. Weekly Digest, 42; same case, 101 N. Y., 126; Hunn *v.* Hunn, 1 T. & C., 499; Pierson *v.* The People, 79 N. Y., 432-435; People *v.* Carlyle Harris, 136 N. Y., 424; and many other cases collated in the article on "Confidential Communications," *infra*, this volume.

[2] And it is the duty of the patient, when able to do so and requested to do so by the surgeon, to provide assistance for the surgeon when performing an operation which requires such assistance. Holving *v.* Spicer, 92 Ill. App., 499.

intimated, to decline to proceed further with his care of the case, and might sue and recover pay for the services rendered.

Physicians Cannot Contract that they shall Not be Responsible for Want of Ordinary Care and Skill.—An important and salutary exception to the general rule that all parties may contract freely as between themselves stipulations measuring their reciprocal obligations, doubtless applies to the relations between physician and patient. It is an exception which has in most jurisdictions been applied to the contract relations existing between a common carrier and a shipper or a passenger. This is that persons contracting to perform services which are to a certain extent public in their nature, and which, as in the case of the common carrier or in the case of the physician or surgeon, are founded upon conventional relations, and affect the public welfare, are not permitted, from reasons of public policy, to contract for a release or escape from liability arising out of their own negligence or wrong. In short, a physician or surgeon cannot contract with a patient that the patient shall waive any claim for damages growing out of his want of ordinary care and skill. Nevertheless, the physician or surgeon may frankly inform his patient of his want of knowledge and experience as to the particular kind of treatment required by any special and unusual disease or injury. If after full information on this point, and full opportunity to employ some one else, the patient insists that the physician or surgeon go on with such treatment as he is able to give to the case, and injuries result which a more skilful and experienced practitioner might have avoided, it is probable that the courts would hold that the practitioner was not liable under such circumstances, or that such circumstances could be pleaded in mitigation of damages. But it would be the duty of the practitioner in such a case to be exceedingly careful in performing any surgical operations, and not administer any powerful drugs with the strength and medicinal qualities of which he was not acquainted. If he should assume to perform such operations or administer such drugs instead of confining himself to modifying the ravages of disease by the use of well-known simple remedies, or protecting against the consequences of severe injury by the use of ordinary antiseptic dressings and treatment, he would no doubt be liable for any resulting damage, and could not recover pay for his service.

Experiments Not to be Tried on Patients—This Rule Applies to Charity Patients.—For like reasons of public policy it has been held that a physician has no right to try experiments on his patient.[1] In this respect a charity patient will be protected by law and compensated for damages received from experiments on his health and person, just as much as a person from whom a large fee could be expected. Humanity and public policy both forbid that experiments should be tried upon one class of patients any more than another. However this may be, in a case of extreme danger, where other resorts have failed and everything else done that could reasonably be required, and if the patient and his family consent after full information of the dangerous character of the operation, or the unknown qualities and powers of the drug to be administered, the practitioner would be justified and protected if some new methods of treatment not entirely developed or known to the profession, but supposed to be efficacious, should be adopted, although the result might prove unfavorable. In such a case, however, it would be extremely perilous for the physician to stand upon his own judgment alone. He should consult the best talent in his profession available, and abide by the judgment of his colleagues or a fair majority of them; and even then should apply to his course of action the maxim, When in doubt run no risks; better let a patient perish from disease or injury, than while attempting uncertain experiments with the surgeon's knife or the use of dangerous drugs. The safe rule is to take no chances, unless there is a consensus of judgment of several physicians. It may be objected that if no experiments are tried no new medicines or surgical devices could be discovered, or their effects observed. The answer to this objection is that vivisection, and other experiments upon live animals, permit of experimentation to a considerable degree, and often effectually point out the proper course of treatment of the human subjects. In the case of drugs and medicines the practice is well known of physicians trying the effects thereof upon their own persons, in their zeal and anxiety to give to the world new discoveries. But, as heretofore observed, the law does not recognize the right of the medical or surgical practitioner to tamper with his patients' health by the use of untried experiments, without imposing upon the practitioner liability for all injuries proximately resulting from their use.

[1] Patten *v.* Wiggin, 51 Me., 564.

CHAPTER IV.

OF THE LEGAL RIGHT OF PHYSICIANS AND SURGEONS TO RECOVER COMPENSATION FOR SERVICES.

Liability to Pay for Services.—An important matter for physicians and surgeons is the question as to who is responsible, or liable to pay for their services. If there is an express contract this question does not arise; but in most instances the person performing the services renders them upon call, and it is necessary for him to understand his legal right to recover pay for services in the absence of an express contract.

Person Treated, and Not Person Calling in Physician, Employs Him and is Liable.—In the first place, it must be stated as a general proposition that the person for whom the services are actually rendered, or upon whom the operation is performed, is bound to pay for them, if otherwise capable in law of making contracts and incurring obligations. And secondly, that one who calls a physician or surgeon to attend a patient is not presumed to have contracted to pay for the services rendered, unless his relations with the patient are such that he would be obligated in law to pay, even if he had not himself called in the medical man.

In the first case it is presumed that the patient is liable, because he receives the benefit of the services, and nothing less than a distinct understanding that he was not to pay will relieve him from this obligation.

Married Women and Infants Generally Not Liable.—Where such a person is a married woman, unless the case arises in States or countries where married women have been declared by statutes to be liable the same as if single, this rule does not obtain. Nor is an infant personally liable when he is living with his parent or guardian. Hull *v.* Connelly, 3 McCord (S. C.), 6; Klein *v.* La Amoreaux, 2 Paige Ch., 419; Atchinson *v.* Bruff, 50 Barb., 384; Wilcox *v.* Smith, 26 Barb., 341. But the contract of an infant for medicine and medical attendance is

deemed a contract for necessaries, and will be held valid and enforced against his estate if there is no person standing *in loco parentis* who can be held liable. 3 Barn. & Cress., 484; 2 Kent Com., 236. In cases when the parent of the infant or the husband of the married woman is liable, this liability obtains because the services rendered are deemed necessary, and fall within the common-law obligation of such persons to provide and pay for necessaries for those whom they are bound to support and maintain.

Burden upon Physicians Treating Minors to Show Services Necessary.—But even in such cases the burden is upon the person performing the services to show that they were necessary, and it is his duty to know, or learn, the true legal status of the patient, and the true legal relations of the patient to the person other than the patient from whom payment is to be claimed. As said in the case of Crain *v.* Baudouin (55 N. Y., 256–261), "in the case of minor children even, the law imposes this duty upon those who would furnish them with necessaries, relying upon the credit of their fathers, and seeking to charge them. (Hunt *v.* Thompson, 3 Scam., 179; Van Valkinburgh *v.* Watson, 13 J. R., 480)." "*A fortiori*, it is so in the case of an adult married daughter living with her husband." And as to the liability of the husband of a married woman in the absence of statute giving her legal capacity to contract and charge her separate estate, consult Moody *v.* Osgood, 50 Barb., 628; Potter *v.* Virgil, 67 Barb., 578; Crain *v.* Baudouin, 55 N. Y., 256–261.

Mother of Infant probably Liable after Father's Death.—It has been a much disputed question whether after the father's death the mother becomes responsible for necessaries furnished for her minor children. The theory of law upon which a father is made liable proceeds upon the ground that he is bound to support the child and has a right to the child's services during its minority.[1] It has been held that the mother after the death of the father is entitled to those services. Campbell *v.* Campbell, 3 Stock. (N. J.), 265; Cain *v.* Dewitt, 8 Iowa, 116; Furman *v.* Van Size, 56 N. Y., 435–439, disapproving Bentley *v.* Richtmeyer (4 Comstock, 38), and approving *In re* Ryder, 11 Paige, 185. If she is entitled to the services of her child,

[1] See on this question also Bigelow's "Leading Cases," on Torts, 295–303.

she must be bound to support and care for it; and so it was held in Furman *v.* Van Size cited above.

Estates of Insane Persons Liable in a Proper Case.—Persons of unsound mind are liable for necessaries furnished for their benefit, and can be made to pay therefor at reasonable and proper rates, but they cannot make contracts for a specific rate. It is always a question of fact as to what sum should be charged against their estates, if they have any.

Master Not Liable for Services Rendered Servant without Special Contract.—In the case of master and servant, while at common law as between a master and servant the master was bound to provide medicine and food for the servant when the servant was an inmate of the master's house, this is an obligation which a third person could not enforce, and the master can only be held liable for services rendered to the servant, upon proof of a specific contract with him to pay for them.

Case of Crain v. Baudouin Considered.—The case of Crain *v.* Baudouin, *supra*, affords an interesting discussion before the highest court of New York State, as to the question as to how far a father calling a physician for an adult child for whom he is not bound to provide, although lying sick at the father's house, can be held liable for the services rendered upon such call. In that case the plaintiff attended as a physician upon the daughter of the defendant, who was sick at his house. The daughter was of full age, married and living with her husband, but was brought from that of her husband to that of her father in order that she might be under the care of her mother. Defendant was present when plaintiff made his calls, gave the latter a history of the patient's illness, and received directions as to her treatment. He told others of the frequency and length of the plaintiff's visits, and of his opinion of the case, without any disclaimer of liability. The Court held, however, that these facts were insufficient to imply a promise on the father's part to pay for the services, and that the additional facts that the defendant consented to the calling in of a consulting physician, and that a bill was sent in by the plaintiff, unless acknowledged and acquiesced in by defendant, or that he had before this employed other physicians, were also insufficient to raise an implication of law of such a promise to pay. The plaintiff relied in his argument upon the fact that the patient was a daughter of the defendant, but the Court held that any presumption which might arise from this had the daughter been under age, was overcome by the fact that she was past a majority, and was married and lived with her husband and children. The plaintiff also relied to support his cause

of action upon the interest exhibited by the defendant in the course of treatment pursued, and the other facts as to the presence of the defendant when the plaintiff made his professional calls alone and in consultation; his receiving directions as to treatment; his recognition to others of the fact that the plaintiff was in attendance; his reciting to others a knowledge of the frequency and length of the visits of plaintiff without any disclaimer on the part of the defendant of liability. The Court said as to these facts: "It is true that particular acts will sometimes give rise to particular obligations, duties and liabilities. But the party whose acts are thus to affect him must be in such predicament as that those acts have, of legal necessity, a significance attached to them, at the time, which he may not afterward repel. . . . It has been held that a special request by a father to a physician to attend upon his son, then of full age but lying sick at the father's house, raised no implied promise on the part of the father to pay for the services rendered." See Boyd *v.* Sappington, 4 Watts (Pa.), 247; and so in Veitch *v.* Russell, 3 Ad. & Ell. (N. S.), 927, it is said: "A physician attends in every case on request; that fact alone is not enough for the inference of a special contract;" and see Sellen *v.* Norman, 4 Carr. & P., 284. Still less where there has been no special request by the father to the physician, and no more than acquiescence in his calls. As it would be unnatural for the parent of an invalid child, though legally emancipated, or for an intimate and confidential friend of hers, not to know the rise and course of her malady, not to be interested in the state of it as disclosed at any time to skilled inspection, not to be so anxious as to be in waiting when scientific skill was to be applied for its cure, not to be ready to receive directions for treatment in the intervals; so it is not to be implied in the one case more than in the other that, from these manifestations, because unaccompanied with an express repudiation of liability, a liability may be implied. They are to be referred to natural affection and friendly sympathy, rather than to an acquiescence in the rendition of a personal benefit, or counted as acts done under a sense of legal obligation." The Court further said that "even if it should be assumed that the usage exists that the physician called to consult with him who is in attendance, with the consent of the person who has employed the latter, is in contemplation of law in the hire of that person, still the assent of the defendant to the calling in of the consulting physician, and his expression of desire to be present when he came—until he is shown to have employed the plaintiff—is a basis too weak for an implication of law, that he promised to pay his consultation fees. Still less it is a fact from which to imply a promise to pay the plaintiff." This case is, however, close to the border line, and it may be well criticised and denied its apparent full weight of authority, notwithstanding the very great learning and ability of the learned Judge Folger, who wrote the opinion, upon the ground that it appears

that the father had as a witness expressly denied calling in the plaintiff or authorizing anybody to call him in, or authorizing the employment of a consulting physician, and that on the trial the Court had found upon the whole testimony in the case that the defendant had never employed the plaintiff. Taking the decision as a whole it cannot be regarded as determining that upon such a set of circumstances as is there disclosed, the father could not in any event have been held liable, but rather that the trial court having found upon the whole testimony that the defendant was not liable, having witnesses before it fully able to judge of their capability, the appellate court could not say as a matter of law that a finding in favor of the defendant should be overruled. This case is considered here at some length chiefly for the purpose of affording an illustration to physicians and surgeons which will suggest to them the advisability of care in ascertaining in all cases who is responsible for their charge for services. See also Bradley *v.* Dodge, 45 How Pr. (N.Y.), 57; Smith *v.* Riddick, 5 Jones (N. C.), 42.

Liability of Third Persons Calling a Physician—General Rule.

As to liability for services rendered, when the medical man is called by one person to attend another, it may be stated as a general rule that in order to create such a liability it must appear that the person calling either actually intended to become responsible, or acted in such a manner that the physician was led to suppose that he so intended.

Liability of Railway Company Calling Physician in Case of Accident to Employees, etc.—Another more troublesome question has arisen where physicians and surgeons have been called in by employees of a railway company in case of sudden accident or injury. In one case in New York, the Superior Court of New York City held, that although the general superintendent of a railroad company testified that he had general authority to hire and discharge men, and that he had employed a physician, the railroad company was not liable.[1]

This doctrine seems to be opposed to the weight of authority. See cases collated in Vol. 18, "Am. and Eng. Cyclopædia of Law," p. 434 *et seq.*, some of which are: Toledo, etc., R. R. Co. *v.* Rodrigues, 47 Ill., 188; Same *v.* Prince, 50 Ill., 26; Indianapolis, etc., R. R. *v.* Morris, 67

[1] Stevenson *v.* The New York, etc., Railroad Co., 2 Duer, 341; same case, 1 Am. & Eng. R. R. Cases, 343; Cincinnati, etc., R. R. Co. *v.* Davis, 43 Am. & Eng. R. R. Cases, 459.

Ill., 295; Cairo, etc., R. R. Co. *v.* Mahoney, 82 Ill., 73; Atchison, etc., R. R. *v.* Beecher, 24 Kansas, 228.

Same Rule does Not Prevail in United States in Case of Accidents to Passengers.—The cases just noted were all cases of employees. In the cases of injured passengers it has been doubted whether the same rule applied, some State courts holding that in that case there is no obligation to furnish medical and surgical attendance, but that the physician attending must look to the persons whom they attended. Union Pacific R. R. Co. *v.* Beatty, 35 Kansas, 265; Brown *v.* Missouri, 67 Missouri, 122.

Different in England.—In England a different rule prevails—one more humane and in consonance with the moral obligation imposed by the relationship of the parties. In Walker *v.* The Great Western R.R. Co., a recent case (Law Reports, 2 Exch., 228), Chief-Justice Kelley, in the course of the argument, made this remark: "Must a board be convened before a man who has his legs broken can have medical attendance?"

But in Cox *v.* The Midland Counties R. R. Co. (3 Wellsby, H. & G., 268), the station master, employed as the chief officer of the passenger and other departments, called in a surgeon to perform an operation upon a passenger injured by a train. The road was held not liable.

On the other hand, in Langan *v.* Great Western R. R. Co. (30 Law Times, N. S., 173), a sub-inspector of railway police was held to have implied power to employ a surgeon for an injured employee. But in Arkansas an attorney for a railroad company was held not authorized to do so. St. Louis, etc., R. R. Co. *v.* Hoover, 53 Ark., 377.

Doctrine in Indiana the More Sensible One.—The more sensible doctrine seems to be established in this country, in the State of Indiana at least, in the case of Terre Haute R. R. Co. *v.* McMurray (98 Ind., 358), in which the Court held that where there was great necessity for the employment of a surgeon, the conductor of a train has authority to employ the surgeon, if the conductor is the highest officer in rank on the ground at the time. But in that case the Court expressly states that this liability grows out of the exigencies of the case; not out of any theory of general authority.

Authority of Railroad Physician to Employ Nurses, etc., Doubtful.—It has also been disputed whether the authority of the company's physician extended far enough to render the company liable for services performed by nurses employed by him, or for board and lodging engaged by him for injured employees. In Bingham *v.* Chicago, etc., R. R. Co. (79 Iowa, 534), it was held that the authority was sufficient, but in that case testimony appeared tending to show that an agent of the company who had authority to employ the physician had authorized him to employ two nurses. The converse doctrine—namely, that the fact that a physician of the company was authorized to buy medi-

cines on the credit of the company does not authorize the inference that he has power to render the company liable by a contract for board and nursing of a person injured on the company's road—was held in Maber *v.* The Chicago, etc., R. R. Co., 75 Missouri, 495; Brown *v.* The Missouri R. R., 67 Missouri, 122. To the same effect, see Louisville, etc., R. R. Co. *v.* McVeigh, 98 Ind., 391; Cooper *v.* N. Y. C. & C., 6 Hun, 276; and St. Louis, etc., R. R. Co. *v.* Hoover, 53 Arkansas, 377. 2 Redfield on Railways, 114:

On the other hand, where a physician and surgeon has been duly employed by a sub-officer or servant of the railroad company, ratification of this employment, by those having authority to employ him and to render the company liable, will be inferred from slight circumstances.

Such was the case of Louisville R. R. Co. *v.* McVeigh, which has been cited.

And in another case where information of the fact of the employment had been conveyed to the company's general manager, and he had neglected and omitted to repudiate the employment or to terminate it, and the surgeon went on and performed services, it was held that from these facts a ratification will be inferred. Indianapolis R.R. Co. *v.* Morris, *supra.* See also Toledo, etc., R. R. Co. *v.* Rodrigues, *supra;* Same *v.* Prince, *supra;* Terre Haute, etc., R. R. Co. *v.* Stockwell, 118 Ind., 98.

Presentation and Retention of Doctor's Bill Raises No Presumption of Liability.—The presentation of a bill to a person containing charges against him for services rendered another person, and his retention of that bill without disclaimer of liability, does not raise a presumption of liability, for it is not necessarily an account stated. To constitute an account stated, there must be not only a statement of account, but acquiescence in it; mere retention of the account is not sufficient.

Bills Presented Not Conclusive as to Amounts Charged.—On the other hand, if a bill is presented which contains charges which are not acquiesced in, the person making out and presenting the bill is not absolutely bound by the charges therein contained, although such a bill affords some evidence as to the value of the services rendered.[1]

Claims Against Estates of Deceased Persons.—A bill for a physician's services constitutes a claim against the estate of

[1] Bronson *v.* Hoffman, 7 Hun, 674; Williams *v.* Glenny, 16 N. Y., 389, and see Ordronaux on "Juris. of Med.," *supra*, p. 46; but see also Danzinger *v.* Hoyt, 46 Hun, 270.

a deceased person, like any other debt. In some States it is a preferred claim.[1] In this connection it should be observed that short statutes of limitation exist in most countries and States applicable to such cases, shorter than the ordinary limitation imposed by law upon the right to sue upon claims for services rendered (which is six years). In order to preserve his legal rights, the physician should as soon as possible after the death of the person for whom his services have been rendered, ascertain who is the administrator or executor of the estate of such person, and file with such representative, personally, proof of his claim.

Patient who Receives Benefit of Services of Consulting Physician Liable.—The liability of a patient for the services of a consulting physician is generally governed by the same rules as his liability to the physician in immediate charge of the case.[2]

Where the patient accepts the services of a consulting physician, although he has not directly requested them, he must pay for them if he receives the benefit of them without objecting, because it will be presumed that he ratified the act of the physician who was in charge of the case, in calling the other physician into consultation.[3]

But, however this may be, it is a principle of professional ethics, which has almost acquired the authority of legal doctrine, that a physician in charge of a case should obtain the full assent of a patient, or of his family and friends, if he is too ill to give his own consent, to the calling of another physician in consultation.

No Other Stranger can be Called into Sick-Room without Assent of Patient.—A limitation upon the authority and right of an attending physician is, that if he desires or attempts to call in a stranger not a physician, he must obtain his patient's

[1] And it has been held that a decedent's estate is liable for fees of expert, who by direction of probate court examined widow and testified as to her pregnancy. This notice was put upon the ground that his testimony was necessary for the information of the court in a matter before it affecting the disposition of the estate. Rollwager *v.* Powell, 8 Hun, 10.

[2] Crain *v.* Baudouin, *supra;* Shelton *v.* Johnson, 40 Iowa, 84; Garry *v.* Stadlen, 67 Wis., 512.

[3] And a physician may recover the value of services rendered by his students. People *v.* Monroe, 4 Wend. (N. Y.), 200; Jay Co. *v.* Brewington, 74 Ind., 7. And the physician in attendance is not liable to the physician thus called. Guerard *v.* Jenkins, 1 Strobh., 171.

consent. The obligation of a physician toward his patient of secrecy and confidence is regarded as very strict, and if a physician should call in a student or other stranger, without first consulting his patient, or those who are in some measure related to him and connected with him, it would be a very severe stretch of morals and possibly of law. In fact, in a recent case in Michigan, a physician was held liable for damages who called in a stranger, an unmarried man, who was a non-professional man, to be with him while he was in attendance on a confinement case. In that case both the physician and the person so called in, and who was present at that time, were held liable in damages; and it was further held that the right to recover was not affected by the fact that the patient supposed that the person so called in was a medical man, and therefore submitted to his presence without objection.[1]

The statutes which create the privilege as to professional communications and information necessary to enable the physician to prescribe, might not apply to students or other strangers, and this is probably the reason for the rule of law laid down in the Michigan case. The obligation to preserve inviolate a communication as a privileged communication, including in the meaning of the word "communication" all knowledge or information received while in attendance upon a case, would be held to have been broken by the act of the physician in bringing in a stranger who would not be privileged from testifying.

Measure of Recovery for Services Rendered.

Terms of Express Contract Govern—Reasonable Worth the Rule in Implied Contracts.—In case of an express contract its terms necessarily measure the amount of the charges. In the absence of an express contract fixing the value of the services to be rendered, the measure of damages for breach of payment is like that in any other case of personal services, the reasonable worth and value of the services performed. So likewise if medicines or appliances are furnished, which are not reasonably to be expected and furnished, according to the custom of the school to which the physician or surgeon belongs,

[1] Deway *v.* Roberts, 46 Michigan, 160.

the reasonable worth and value at the time of furnishing them, and at the place of furnishing them, is the measure fixed by the law to determine what shall be recovered for them.[1]

Value—How Proved.—When the medical man is compelled to go into court to enforce payment for his services, it has been questioned whether he can testify to the services rendered, and the facts and circumstances surrounding the patient at the time of the treatment, because it has been claimed that he could not do so without violating the statute against the disclosure by physicians of information received which is necessary to enable them to prescribe. The tendency of the later decisions, however, seems to be that the breach of the patient's contract to pay relieves the physician from his obligation of secrecy, and consequently, that if it is necessary for him to go into court and prove the value of his services, he may testify, within reasonable limitations, to all matters necessary to inform the court fully as to the nature and extent of the disease or injuries of the patient, in order that he may show the responsibility imposed upon him and the extent of the services that he has rendered. This subject is fully considered in the article on "Confidential Communications."[2] The usual course of practice where there is not an express contract fixing the charges, is to prove the facts and circumstances showing the treatment and services, and then to produce other physicians who, in answer to a hypothetical question stating the facts and circumstances in the case, assuming them as true, are allowed, if they state they know the value of such services, to give an expert opinion as to what that value is.[3] It has also been said (Ordronaux, "Jurisprudence of Medicine," § 43), that if a fee-bill of charges for such services has been established by an association of physicians recognized by law, such as a county medical society or a State medical society, incorporated pursuant to statute, such fee-bill can, if properly authenticated as having been adopted by the association, be offered in evidence on behalf of the patient and against the physician. But such a fee-bill in such a case would not be held to be conclusive

[1] MacPherson v. Chedell, 24 Wend., 15; Adams *v.* Stevens, 26 Wend., 451; Story on Bailments, § 37.

[2] Vol. I., pp. 89 *et seq.*

[3] Duly licensed physicians are presumed to be experts as to the value of other physicians' services. Beekman *v.* Platner, 15 Barb., 550.

evidence of the value of the services, but will be received in evidence, if at all, merely for the purpose of showing what was the usual and ordinary charge in such cases. As we shall see later on, under "Malpractice," a judgment for services rendered, however small, is a bar to an action of malpractice, because a judgment for the value of the services rendered involves proof on the part of the plaintiff, and a finding on the part of the court, that the services had value and were skilfully performed and properly rendered.[1]

Custom of Physicians to Treat Each Other Gratis, Enforceable.—Physicians frequently treat each other, and it has been held, where the custom exists to do so without charge, that such a custom is binding. Of course, this rule does not prevent physicians from making an express contract to waive the custom and agreeing that the services be compensated.

Elements to be Proved in an Action for Service, etc.—General Advice.—The result of these rules may be thus summarized, viz.: The elements to be established in an action for services by a physician against a patient are three in number—(1) the employment; (2) the performance of the services;[2] and

[1] Bellinger *v.* Craigue, 31 Barb., 534; Gates *v.* Preston, 41 N. Y., 113; Blair *v.* Bartlett, 75 N. Y., 15. The general rule is that in an action arising on contract damages arising for a tort cannot be set up as a counter-claim. It follows from this that in an action of a physician for services, damages for malpractice could not be recouped or counter-claimed ordinarily. The way in which that rule is avoided, and the safer method, is for the defendant to plead that it was part of the contract of the physician (which it undoubtedly is), to perform his services in a faithful and skilful manner, and that he committed a breach of it, thus charging the damages which flowed from his acts as a breach of contract, not as a cause of action in tort for malpractice or negligence. If that is done the counter-claim arising in malpractice can probably be pleaded in an action for services, and possibly a counter-claim in excess of the amount claimed by the physician recovered as an affirmative judgment against him. On the other hand, in an action for malpractice brought by the patient against a physician, which is generally in form an action for a tortious act, or neglect, the physician cannot plead the performance of services and the non-payment of his bill as a counter-claim or recoupment, because that arises on a contract. If there is any exception to this rule it will be found to grow out of the language of sections 549 and 550 of the Code of Civil Procedure of the State of New York, and of similar enactments in other States, which permit counter-claims arising out of the same subject-matter as the cause of action, to be pleaded in that action. In New York State, however, any effect of that kind is negatived by the general provision that the actions must not only arise out of the same subject-matter but be of the same kind and class.

[2] The degree of care and skill required to be shown to entitle the physician or surgeon to recover compensation for his services has

(3) the value of the services, that value being either a fixed value determined by the terms of the contract between the parties, or the reasonable worth and value of the services determined by evidence of experts upon that subject. It is, therefore, important that physicians and surgeons should be advised, when entering upon the practice of their profession, to keep a record of their transactions and of their business generally. Because, if they are compelled to go into court to recover for their services, they will be called upon to describe with minuteness the character and extent of the services they have performed in order that the value thereof may be correctly ascertained and determined in the suit. Any person in active practice who is not blessed with a most tenacious and particular memory is liable to forget a great many details which, with a record in hand, properly kept, could be brought to his memory and be testified to with absolute truthfulness and conviction. And the record itself, when properly shown to be a book of original entry, is generally receivable in evidence, as a memorandum of the transaction.[1]

already been stated to be simply such care and skill as are possessed by the majority of other professional men of the same school of practice at the time, or what is known as ordinary care and skill.

[1] Foster *v.* Coleman, 1 E. D. Smith, 85; Larue *v.* Rowland, 7 Barb., 107; Clarke *v.* Smith, 46 Barb., 30; Knight *v.* Cunningham, 6 Hun, 100; Bay *v.* Cook, 22 N. J. L., 343.

CHAPTER V.

OF THE PRIVILEGES AND DUTIES OF PHYSICIANS AND SURGEONS WHEN SUMMONED AS EXPERT WITNESSES IN COURTS OF JUSTICE.[1]

Introductory—Distinction Between Expert Witnesses and Other Witnesses.—One of the most important positions that a medical man is called upon to assume by virtue of his professional character, is the position of expert witness. Most writers on medical jurisprudence confine themselves, in the discussion of this subject, to presenting the medico-legal rules which appertain to this position, and concede its high importance. Before defining what is meant by the term expert witness, or treating of the rules which determine the status of such witnesses in court, and their duties, it seems advisable to introduce the subject by a brief consideration of the distinction between ordinary witnesses and expert witnesses. When medicine and law are united in the purpose of investigating facts, and bringing about a legal determination as to what are or are not facts, they co-operate with each other in this way. The law furnishes the machinery for the inquiry and the rules which determine how it shall be prosecuted. The medical man, however, is called upon as an assistant to the law, because of his skill and experience in his profession, which enable him to ascertain and interpret the circumstances from which the facts sought to be established are to be inferred. Ordinary witnesses testify concerning matters of observation, the court and jury being endowed with the sole power to determine the credibility of their evidence and the true result of their observations. Yet the border line of distinction between witnesses who testify merely to actual matters of observation, and those who give their

[1] The writer is indebted for many valuable suggestions concerning this subject to Ansley Wilcox, Esq., of the Buffalo, N. Y., Bar, and his admirable lectures on Medical Jurisprudence before the Medical Department of the University of Buffalo.

opinions upon and draw inferences from established facts and circumstances, is a wavering one. The general rule of evidence is well understood, that hearsay evidence is inadmissible, and yet, like any other rule, this has its exceptions which grow out of the necessities of given cases. This is so because there are and always will be, matters brought before courts for investigation and determination, long after the witnesses who personally saw the facts and circumstances of the particular case in which such matters are concerned have died, or have withdrawn beyond the reach of the process of the court. Possibly no record in writing of such facts and circumstances has been left, or if in writing it lacks the sanctity of being a judicial writing, and hence is no better evidence than any other form of hearsay evidence. For this reason in matters of family history, pedigree, custom, and the like, hearsay evidence is permitted, and is entitled to as much weight as any other evidence, if the witnesses giving it be trustworthy.

In Matters of Common Experience Witnesses in General Often State Conclusions.—Moreover, in matters of common experience, the testimony of any witness, if carefully analyzed, often shows that he is sometimes allowed to draw, and state, his conclusions and inferences, instead of being required to confine his evidence simply to telling in the strictest possible way, and with the closest limitations, what he actually witnessed. A good illustration of this is the case of a person who sees a crime of homicide committed by shooting, and is called upon to testify in court. He would be allowed to testify that the defendant, if he could identify the prisoner at the bar as such, was the person whom he saw fire the shot, although he might not have examined him with close scrutiny, and might never have seen him before the crime. In saying that the defendant was the person who fired the shot, while he would be in terms testifying to a fact, he would still be drawing an inference, and giving an opinion, based upon his recollection of the person whom he saw engaged in the act of firing, and of the likeness or resemblance of such person to the prisoner at the bar, which would be a matter of comparison and of opinion. So, too, although he could not see the bullet take its course from the mouth of the gun and imbed itself in the body of the deceased, yet if he saw the firing, heard the explosion, saw the

flash and smoke of the powder, observed the direction in which the accused pointed the weapon, and saw the deceased stagger and fall, he would be allowed to testify in answer to a direct question whether or not the accused shot the deceased. And, yet in making up that answer he would be testifying not simply to a matter of actual observation, but to a conclusion. As it is in reference to the question of identity so it is as to many other matters which come before our courts, in all of which the witnesses are permitted, without objection, to testify to conclusions and to give answers which are the result of inferences which they draw themselves, rather than a statement of their actual observations. The law is not a metaphysical but a practical science, limited and confined by the practical restrictions which experience has shown must be put upon it, in order to enable it to accomplish its object of administering justice between man and man. Men form such conclusions as have been indicated, instinctively and unconsciously, and it would be practicably impossible for them to narrate any occurrence without embodying in their narration some of these natural and unconscious conclusions. The law, therefore, includes among the matters which witnesses are permitted to characterize as facts, those daily and hourly inferences and deductions which all men are accustomed to make, and concerning which no two men who are properly constituted can greatly differ. It is true that this practice sometimes leads to error, but it has grown out of necessity. The greatest safeguard is, that upon the trial of a question of fact both sides are represented by counsel, and the opportunity which cross-examination offers to an advocate of even reasonable and ordinary skill is such, that these conclusions and inferences may be sifted down through the chain of observation, and the process of drawing these conclusions and inferences from a series of facts, tested in such a manner that the improbability, probability, or truth of any given inference or conclusion may be determined with substantial accuracy. The illustrations which have been given above exhibit the simplest form in which so-called direct testimony can be demonstrated to be not always positive and direct testimony, but somewhat a matter of inference. Other examples and illustrations of common occurrence will exhibit still more closely the line between actuality and opinion. At times it

becomes essential to the determination of a question, that the courts should know whether or not a person was angry, whether or not he was intoxicated, or whether or not at a given time, when his mental status was under observation, he acted rationally or irrationally. Lay witnesses have for many years been permitted to testify from observation, and without possessing any special qualification to do so, as to the existence or non-existence of such conditions as those just mentioned in a person whose actions are under consideration. It is manifest that in making any such inferences the witnesses' testimony is mainly a conclusion based on inference. Take the case of anger. How shall that be determined? It is difficult to describe anger. A loud voice, a flushed face, the use of bitter words, nervous, excitable, demonstrative action—all these symptoms might occur, or but few of them might occur. So, too, in the matter of intoxication. It is well known that some individuals exhibit the effects of intoxicants in an entirely different manner and degree from others. Some men who are very much intoxicated, so as to be quite incapable, in the eye of the law, of forming a criminal intent, or of contracting an obligation which would be valid, may still be able to walk perfectly straight, or to talk without much confusion. Others, whose walk and demeanor would indicate a considerable degree of intoxication, might be mentally clear and unruffled and even stimulated by intoxicants to precise mental co-ordination and reasoning. Again, there are persons, as to whom a witness, after stating that he had observed them, and after stating the particular matters and things in which such persons were engaged, might with apparent accuracy state that they acted rationally or irrationally, and yet such persons might nevertheless, upon further examination, be found to have been acting according to a particular custom or habit, or idiosyncrasy of long years' standing. Thus it is apparent that in each of these cases, when the witness attempts to state what, out of necessity, the court treats as a fact—viz., whether a given person is or is not angry, or intoxicated, or irrational—the witness is really testifying to the result, in his own mind, of his observations of the condition and conduct of the person who is under investigation, when compared with a standard which the witness has erected for himself. Hence such results are really

matters of opinion evidence, pure and simple. Other examples of a like character are found in statements as to weight, height, distance, speed, and the like, as to which men of common powers of observation, who are not strictly experts, are, because of convenience and necessity and the probability of reasonable and ordinary accuracy, commonly permitted to give their own judgment and conclusions as evidence.

All Witnesses Often Permitted to Draw and State Conclusions in Matters Involving Numerous and Complicated Details.—Thus the practical necessity of the administration of justice has led to the establishment of the rule, that where the details of an occurrence are numerous and complicated, and are incapable of precise description by ordinary observers, witnesses are permitted to use, in testifying, general expressions which really embody their conclusions from the facts or details observed by them. Greenleaf on Evidence, Section 440, note A; Wharton on Evidence, Section 434.

Wharton says that "the distinction between expert witnesses and ordinary witnesses is this: the non-expert witness testifies to conclusions which may be verified by the adjudicating tribunal; the expert, to conclusions which cannot be so verified. The non-expert gives the results of a process of reasoning familiar to every-day life; the expert gives the results of a process of reasoning which can be determined only by special scientists." See also People *v.* Fernandez, 35 N. Y., 49. People *v.* Deacons, 109 N. Y., 374–382.

This learned writer (Wharton) also says, at Section 437 of the same treatise:

"Where conclusions depend upon facts whose evidential weight can only be determined by those familiar with a particular specialty, then these conclusions may be given by experts in such specialty." Such also is the exact derivative meaning of the word expert, it being derived from the Latin word "*expertus*," meaning, literally, "experienced," and hence skilled by experience.

Functions of an Expert Witness Essentially Judicial.—It is the function of an expert witness to reason about facts, to explain their connection with one another, and to draw conclusions and inferences from them. Hence, a witness, however expert in any ordinary sense in his specialty, when he is called

upon merely to narrate facts which he has observed, is an ordinary witness, and is governed by the same rules which apply to the ordinary witnesses. When, however, he is called upon, in addition to recounting facts, to explain or interpret them by reference to assumed facts, he becomes properly an expert witness. It thus appears that an expert witness must necessarily perform a part of the duties which devolve upon the court or the jury. His position is, therefore, essentially judicial, except that he has no power to enforce his determinations by judicial process. The importance and responsibility which the law thus confers upon an expert are of the highest character. He ranks the coequal with the tribunal itself in his peculiar province, so far as relates to his individual responsibility. That this should tend to elevate such witnesses to a high social position, and ought to require the most exact and faithful integrity of purpose and statement, is self-evident.

Difference Between Status of Expert Witnesses in France and Germany and in the United States and England.—In some foreign countries, notably in Germany and in France, experts in medico-legal matters have an assured official position, and are generally not allowed to be selected at hap-hazard according to the will or the length of the purse of those who need their services. The consequence of this method of obtaining expert evidence is, that expert witnesses in those countries command a high measure of respect and honor.

Unfortunately, however, in this country, where the opposite practice prevails, the weaknesses of human nature are such that the common people, newspapers, lawyers, and even the courts in some recorded opinions and decisions, have come to express a great want of confidence in the weight and value of expert testimony. This deplorable result of a bad system of procedure is universally recognized, yet our State legislatures have as yet refrained from attempting to correct it.

Hence, in considering the value of expert testimony *in matters of medical jurisprudence*, it must be conceded, in the first instance, that the difference between the system prevailing in this country and in England, and that which prevails on the Continent, notably in Germany and France, has not tended to raise but to depress the value of such testimony in the first-named countries. In the latter countries, the experts upon

medico-legal questions are officers of the court, or are treated as such. They form, in a sense, a part of the judicial system, and the expression of their opinions consequently carries with it great weight. Moreover, under the system which prevails there, it has been possible for men to be educated up to a high degree of skill and experience in the particular branches of physiological or psychological or physical investigations which they pursue, while here in America, and to a certain extent also in England, experts are such for other reasons, and by the operations of other causes, than the fact of their permanent employment in that capacity. As a general thing they become skilled in their profession or in the particular branches of it in which they practise as specialists, and are summoned to testify simply because they are selected by one party or another to a lawsuit.

Mr. Wharton's View of this Question in the Main Hostile to the Prevailing System Here.—The effect of the methods which thus prevail has not been entirely to the advantage of the medical profession or of our courts. Wharton, in his work on "Evidence," Section 454, observes upon this point: "When expert testimony was first introduced it was regarded with great respect. An expert was viewed as the representative of a science of which he was a professor, giving impartially its conclusions. Two conditions have combined to produce a material change in this relation. In the first place it has been discovered that no expert, no matter how learned and incorrupt, speaks for his science as a whole. Few specialties are so small as not to be torn by factions, and often the smaller the specialty the bitterer and more inflaming and distorting are the animosities by which these factions are possessed. Particularly is this the case in matters psychological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand, and to defend it with vehemence. '*Nihil tam absurdo*,' which being literally translated means that there is nothing so absurd that the philosophers won't say it! In the second place, the retaining of experts by a fee proportioned to the importance of their testimony is now as customary as is the retaining of lawyers. No court would take as testimony the sworn statement of the law given by counsel retained on a particular side, for the reason that the most high-minded

men are so swayed by an employment of this kind as to lose the power of impartial judgment; and so intense is this conviction that in every civilized community the retention by a judge of presents from suitors visits him not only with disqualification but disgrace. Hence it is that, apart from the partisan character of their opinions, their utterances, now that they have as a class become the retained agents of the parties, have lost all judicial authority and are entitled only to the weight which sound and consistent criticism will award to the testimony itself. In making this criticism a large allowance must be made for the bias necessarily belonging to men retained to advocate a cause, who speak not as to fact but as to opinion, and who are selected, on all moot questions, either from their prior advocacy of them or from their readiness to adopt the opinion to be proved. In this sense we may adopt the strong language of Lord Kenyon, that skilled witnesses come with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."

This author then proceeds to show that under the civil law system the conclusions of experts were formerly treated as unassailable facts, but under the English and American common law system this is not the case, but their testimony is to be weighed by the court. He says: "The grounds on which the conclusion is reached may be asked for: the expert's capacity for drawing conclusions, as well as his premises, may be assailed. Cases of conflict are to be determined, not by the number of witnesses, but by the weight of their testimony, and though the opinion of an expert of high character may be entitled to great respect, yet if questioned, its authority must ultimately rest upon the truth, material and formal, of the reasoning on which it depends."

Judge Davis, of the Supreme Court of Maine, in Neil's case (cited in Wharton and Stille's "Medical Jurisprudence," Vol. I., Section 294), said: "If there is any kind of testimony that is not only of no value, but even worse than that, it is in my judgment that of medical experts. They may be able to state the diagnosis of a disease more learnedly, but upon the question whether it had at a given time reached a stage that the subject of it was incapable of making a contract, or irresponsible for his acts, the opinions of his neighbors, of men of

good common sense, would be worth more than that of all the experts in the country."

Such stinging criticisms as these, and others which might be cited, of a like character, may not be always merited. It is certain that medical experts' opinions, if fully enlightened by scientific research and free from partisan bias, ought to occupy a position like that of judicial opinions in weight and decisiveness upon the questions submitted to them. Such was the position occupied in the public estimation, and in that of judges and counsel, by the great Dr. Caspar in Germany, and Foedere or Pinel, and others since their time, in France. But this position was acquired chiefly because of the fact already mentioned, that under the system of administration of justice which prevails in those countries these great men were regarded, and acted, as a component part of the judicial system. They were called in as officers of the law to assist the court in forming a judgment, and determining disputed questions of fact, in cases involving life and death, or the devolution of property, where scientific experience, knowledge and skill, not possessed by judges or by counsel, was necessary for the determination of the questions involved. The root of the evil in America is, as already pointed out, to be found in the system which allows parties to retain and pay their own experts without any substantial restrictions. Sooner or later, among the other reforms in our judicial system, it will be found necessary to reform this evil by the enactment of laws requiring that the witnesses in medico-legal cases, particularly those in which a crime is alleged to have been committed, shall be designated by the court, or by some public authority, and paid from the public treasury instead of by the parties. Such experts would then occupy their proper position of special counsel, advising and assisting the legal counsel and the court, but they would not be taken out of this sphere and put in the utterly inconsistent one of witnesses. Their status and their duties would be as clearly distinguished from that of expert witnesses as now known, as the status and duty of the lawyer are from the status and duty of the judge. The present system has been said to be very much like putting a lawyer, who has just argued his client's case, on the bench to decide it. Whether experts should be appointed as permanent government officials, like our judges, or should be selected

specially for each case like juries, referees, or arbitrators, and in the latter event whether they should be nominated by the parties and selected by the court from such nominees, or otherwise, are all questions of detail.

Our judges and lawyers seem slow to recognize the fact that the duties of experts are judicial, or at least quasi-judicial; to pass upon certain facts which neither the court nor the jury can understand without their aid. But, as we have seen from the citations just given, judges and lawyers have fully recognized the unreliability of expert testimony, produced as it now is in England and in this country at the whim and selection of the parties and paid for, much or little, according to the means of the parties.[1]

Method of Preliminary Examination of Experts—On Medical Questions a Licensed Physician Presumed Competent.—As the system exists here, the only power that the court has over the selection of an expert, is to determine, in advance of his testimony and of the elucidation of his opinions, whether or not he is competent as an expert. But this power affords little or no check or restriction, because in the effort to get all the light that is possible upon the questions under consideration, and to avoid unduly interfering with counsel in the conduct of the case at bar, the practice has become universal, and is recognized in the decisions and text writers, of permitting any medical man who has a license to practise his profession, to testify as an expert, and to give his opinion as such on any question cognate to his profession. This is so without regard to the amount of study and experience he may have had in the particular matter under consideration. The naked fact that he is licensed to practise is enough. He then—that is, after testifying that he is a practising physician—is clothed with the garment of authority. The only way in which his knowledge can be tested is by cross-examination as to his experience and skill, and possibly by contrasting him as he appears upon the witness-stand and his history as he gives it, with other and more or less experienced and skilful men who follow him.

[1] But the question as to the defects of the system as it now exists has been brought to public attention in the journals of the day, in papers read before medical societies and bar associations, and in arguments in legislative bodies, and it is hoped and believed that ere long a reform, something of the character indicated, may be brought about in this very important matter.

The rule is, that when a witness is produced to give an opinion on a medical question, he is interrogated by the counsel who produces him as to his qualifications. At this point, before he is allowed to give his opinion, it is proper and customary that the counsel upon the other side of the case should be allowed an opportunity to cross-examine as to his competency, and then the court determines whether or not he is a competent witness. If the court pronounces him competent, a hypothetical question is put to him stating the facts of the case, as the counsel interrogating him claims them to be established by the evidence, and the expert is then asked to give his opinion on the question at issue, based upon an assumption that the facts stated are truly stated. Then the opposing counsel has the right to cross-examine, and to ask his views and opinions upon the same question at issue, but assuming as true other and different facts or premises, as he claims them to be established by the evidence. This often involves a test of wit and intelligence, and of forensic acumen, between the counsel and the witness, which serves very little useful purpose, except perhaps to elucidate more strongly than has been here stated the defects of the system which now obtains. It is also not unusual, and in fact is the result of the workings of human nature, that under the manipulations of counsel skilled in cross-examination, skilled in methods of indirection in stating facts, and armed with the powerful weapon of the rule which permits them to insist upon a categorical yes-or-no answer to a question, the jury and the court become confused, the witness loses his temper, or becomes affected more strongly than ever before by bias against his persecutors, as he feels them to be, and the examination ends in a farce. This is not always the case, and the illustration given is an extreme one. Like the citations from judicial criticism of expert testimony which have been given, these matters are only adverted to here as danger signals, a warning to both professions, and with an earnest suggestion of the necessity of reform.

EXPERTS, HOW SUMMONED INTO COURT.

They Must Obey the Summons and Appear and be Sworn. In General they need Not Give their Opinions unless Duly Compensated.—An expert witness is brought into court like an ordinary witness by the usual process of the court. This process is, under the American system, an ordinary subpœna, and, being process of the court, whether or not he has been paid or promised compensation for giving his opinion he must obey the process to the extent at least of appearing in court when called, to be sworn. Interesting questions have been raised as to his obedience to the subpœna to the extent of testifying when he has not been compensated. It has been argued, and the argument is sustained by the decisions of courts of high authority in some States, that his knowledge and skill, acquired by study and by experience, is his property, of which he cannot be deprived without just compensation, under his constitutional rights guaranteed to him by the organic law of this country. On the other hand, in some other States it has been held that he is so far a necessary part of the judicial system that he may be called upon to give the results of his experience, knowledge, and skill forming his opinion, without payment other than the ordinary compensation to witnesses. It is believed, however, that the better opinion is the former; that he does not stand on the same footing as an ordinary witness, whose province it is to testify solely to matters of observation of fact, but that he stands in the position of one who has something to give; something to impart in the way of knowledge or experience, which is his property as much as any other thing movable or immovable of which he is possessed.

A somewhat different question has arisen in the case of a witness who, like a family physician or attending physician, has learned facts and has been paid for his attendance, or who exacts payment for his attendance, as a physician from his patient, and this question is; when such a professional man has been called upon to testify to the information he thus attained, whether he can be asked for, and required to give, opinions based on those facts? Necessarily, having learned the facts by observation, such as the appearance, symptoms, and actions of

the patient, he is, when testifying as to these matters, nothing more or less than an ordinary witness, because he is testifying to matters of observation. As to these matters public policy requires, except so far as it has been modified, or rather extended, by our statutes which forbid testimony as to privileged communications, that he must testify, the same as any other witness. But suppose that, having so testified to the facts, he is asked to give his opinion; for example, in an insanity case, whether the symptoms that he found in his patient led him to the belief as a professional man of experience and skill that his patient was sane or insane. The question is, Can he be compelled to give that opinion, if he chooses to decline to give it without the promise or assurance of further compensation than the mere *per diem* fee and mileage of an ordinary witness? The best authority is to the effect that he must so testify, the reasoning of the court being that his opinion is only a part of what he derived from his original relation of physician to his patient. Wright *v.* The People, 112 Ill., 540; same case, 33 Alb. L. J., 79.

Same Rule in Civil and Criminal Cases.—The rule is the same whether the professional man is called to testify as an expert in civil or criminal cases. In either one he is not obliged to give an opinion as such, independent of a personal knowledge of the facts in the case, without being paid or assured reasonable compensation therefor. His proper course of conduct is, when he has obeyed the subpœna and is in the presence of the court and has been sworn, and the questions put by counsel disclose that the object of his examination is to elicit from him an opinion, to state to the court that he has not been paid any other compensation than that of an ordinary witness, and that he respectfully declines to give an opinion in the case as an expert, without compensation proportionate to the value of his opinion.[1]

[1] It has been a matter of great discussion whether an expert is compellable to testify on matters of opinion, without compensation, the weight of the decisions being that he is not bound to do so. 1 Greenleaf on Evidence, § 310; 1 Warwick Law Assizes, 158; Parkinson *v.* Atkinson, 31 L. J. (n. s.) C. P., 199; Webb *v.* Page, 1 E. & K., 25; People *v.* Montgomery, 13 Abb. Pr., n. s., 207; *Ex parte* Roelker, 1 Sprague, 276; Buchanan *v.* The State, 59 Ind., 1; Dills *v.* The State, *Id.*, 15; U. S. *v.* Howe, 12 Cent. L. J., 193; *contra*, 6 Central Law Journal, 11; *Ex parte* Dement, 53 Ala., 389; Sumner *v.* The State, 5 Tex., 21; 6 Southern Law Review, 706.; and see generally Wharton on

Whether Witness Competent a Question for Court in Limine.—After the expert is placed upon the stand, as we have seen, the counsel upon the side of the case by which he is summoned interrogates him as to his capacity, the purpose of the interrogation being that his answers shall qualify him and show him to be an expert. Whether or not he is an expert so as to permit the giving of his opinion as part of the case to go to the jury, is for the court to decide *in limine*, that is, at the threshold, and as a matter of discretion, and the exercise of that discretion, if fair and reasonable, will not be disturbed upon appeal by the higher court. It is permissible, but also discretionary, after the counsel calls the witness and has apparently qualified him, for the counsel upon the other side to cross-examine the witness as to his qualifications before he is examined in chief, with a view of determining whether or not there are limitations upon those qualifications which should prevent the court from permitting him to testify as an expert. The general rule is as stated by Greenleaf in his work on Evidence, Sec. 440, that it is not necessary that the medical expert should have actually practised his profession. Nor is it essential that the witness should belong to any particular school of medicine. The law does not undertake to pass upon conflicting theories of medical practice, in determining the question of the qualification of a medical expert. It is proper, however, for counsel to inquire as to what school of medicine the witness is an adherent, because of its importance in weighing the value of his testimony after it has been given.

Persons Not Duly Licensed Sometimes Held Not Competent.—It has also been a mooted question in those States where it is necessary, in order to enable a person to practise physic or surgery, that he should be licensed, whether a person practising without a license, however extensive his reading and practice,

Evidence, sec. 380, note 66, sec. 456; Lawson on Expert and Opinion Evidence; Rogers on Expert Testimony. As to the compensation being paid before the testimony is given, see Wharton on Evidence, secs. 456, 380; People *v.* Montgomery, 13 Abb. Pr., n. s., 207.

It is proper, although not necessary, that upon cross-examination the witness should be asked as to his fee; that is, as to whether he expects to receive any additional fee besides that of an ordinary witness, and it has been held that where the expert witness testified that he was to receive a fee which was contingent upon the case, he was disqualified from testifying. Pollock *v.* Gregory, 9 Bosworth, N. Y. Superior Ct. Rep., 121-124.

would be considered qualified as an expert witness in a court of justice. This point, so far as diligent examination discloses, has not been determined in any reported case, although it has been suggested at *nisi prius* and has been, in one instance within the knowledge of the writer, decided that he is not to be considered an expert in matters involving medical knowledge and skill. The reasoning of the court was that the policy of the State is to prohibit persons not possessing the qualifications required to obtain a license, from acting in any capacity as professors and practitioners of medicine or surgery. If the witness is a member of the profession, legally qualified as such, it has been held that he is sufficiently qualified as an expert if he shows that he possesses the average ability of members of his profession. Hall *v.* Costello, 48 N. H., 176; Tellis *v.* Kidd, 12 Ala., 648; Wharton on Evidence, Sec. 446; Rogers on Expert Testimony, Secs. 17 and 18; Slocovich *v.* Orient Mutual Ins. Co., 108 N. Y., 56.

As to the question whether it is necessary that the witness should actually have practised his profession, see the last-cited text-writer, Secs. 43 and 44, who seems to have entertained views opposite to those stated by Professor Greenleaf.

Wharton on Evidence, Sec. 439, states the rule as follows: "He must have special, practical acquaintance with the immediate line of inquiry more than a mere vague, superficial knowledge. But he need not be acquainted with the *differentia* of the specific specialty under consideration. . . . A general knowledge of the department to which the specialty belongs would seem to be sufficient."

Interested Persons may still Testify as Experts.—Since the law forbidding interested persons from being witnesses has been changed, it has been suggested that an interested person although otherwise qualified might not be a competent witness to give an opinion as an expert. But the established doctrine is that he may give such an opinion; the weight of it, however, would be for the jury to determine. Greenleaf on Evidence, Redfield's edition, Sec. 440, citing Lockwood *v.* Lockwood, 2 Curtis, 309; Dillon *v.* Dillon, 3 Curtis, 96, 102. See also Dickinson *v.* Fitchburg, 13 Gray, 546.

Testimony of Expert, how Impeached.—Sometimes, on cross-examination or otherwise, the fact becomes known that

the witness who is proposed as an expert has expressed an opinion on the subject in hand contrary to that which he has given upon the witness-stand, and the question has been raised as to establishing that fact at the outset and before his testimony goes before the jury, in order to enable the trial judge to determine whether he is competent. The rule in that case is that the testimony as to his prior expression of opinion is not to be received at that time, but will come properly up as rebuttal, he having been asked upon his cross-examination, giving time and place, whether he has made the statements attributed to him. An expert witness may in other respects be impeached like any other witness, that is, by the oaths of persons who know him and have known his reputation, and who testify that his reputation for truth and veracity is bad and that they would not believe him under oath. He may also be impeached by producing witnesses to prove that his special knowledge or technical skill is not reliable or adequate to the undertaking which he has assumed. But this testimony must be from personal knowledge of the man and not from general reputation. Wharton on Evidence, Sec. 437; Le Rose *v.* Commonwealth, 84 Pa. St., 200.[1]

General Rule as to Required Amount of Skill and Experience Stated.—The general rule may be stated thus, as derived from these and other authorities:

[1] This latter case holds that a second expert may be called to testify after the first has been thus challenged, to support his capacity and skill. The contrary rule, however, obtains in Alabama (Tellis *v.* Kidd., 12 Ala., 643; Pugh *v.* State, 44 Ala., 33). Neither can an expert be contradicted by books of science; that is, by books of science introduced in evidence as such (Wharton on Evidence, 666, 721). This is so because the rule is well established that books, although of great authority in themselves, may not, even if proven to be such, be placed in evidence. They may, however, be read to the witness, and so be placed upon the record, passage by passage, and the witness may be asked whether he agrees with that doctrine, not, however, as part of his direct examination, but as part of his cross-examination.

A medical expert is sometimes confronted upon the witness-stand by long quotations from well known medical text-books, and he is asked whether the doctrines, opinions, etc., there laid down are sound. Especially is this done when such doctrines and opinions are in apparent discord with his evidence as he gives it. In such cases as this, however honest, however intelligent and non-partisan the witness may be (except as any opinion on one side or the other of a disputed question may be considered partisan), he is placed in a very difficult position. If the citations and questions are from well-known authors, and he is a modest man, as most men of learning are, it will be difficult for him

The extent of the previous study and investigation, and the amount of skill and information which must be shown, will depend upon the facts of each particular case. But some special and peculiar knowledge or skill must be established, the amount of it to be determined by the trial judge in his discretion. The possession of such knowledge and skill is presumed in medico-legal cases if the witness is a licensed practitioner.

Some Practical Suggestions as to Conduct of Witnesses on the Stand.—In this preliminary examination, the conduct and demeanor of the witness are of no little importance, because it is then and there that he makes his first impression upon the court and jury. He should be perfectly open and unreserved in stating his means of special information, in explaining what are the limits of his personal experience and the extent of his reading; but, at the same time, it would be well for him to avoid all appearance of self-glorification and all tendency to exaggerate his individual acquirements. Often has it occurred that expert witnesses of undoubted capacity and honesty, who are unfortunately grandiose and self-assertive in their manner, have, however honest and able they might be, lost entirely their weight with the court and jury by undue self-complacency and exaggeration of their personal qualifications, during their preliminary examination. This is a matter requiring tact and judgment and nerve, and should be fully understood between

to dény that such authorities as these have great weight, even more weight than his experience, skill, and knowledge entitle him to claim. On the other hand, if he takes the bold course and sticks to his opinion, he is cried down the winds by counsel in summing him up, as a man of gall, boldness, audacity and egotism. His course is difficult whichever way he turns, but modesty as well as honesty is usually the best policy. Perhaps the best thing for such a witness to do under such circumstances is to do as once did the great mental alienist Dr. John P. Gray, when, having given an opinion on a question of insanity, he was cross-examined as to the different theories from time to time prevalent as to what insanity was, and having stated what theories were then the accepted ones, he was confronted by counsel on his cross-examination with the question: "What do you think of Dr. John P. Gray as an authority on that question?" and then with his own writings, quite extensive, of many years before, in which he had advocated theories apparently different from those which he had professed upon the witness-stand. Placed in this position, the distinguished gentleman simply replied: "It is true I cherished those theories at that time, but I lived to learn better," thus substantially disarming any criticism that could be made of him in his capacity as a witness in that case.

counsel calling him and the witness, before the witness is placed upon the stand. In that event, it will be quite safe for the witness to follow closely the questions of counsel by his answers, and to volunteer little or nothing. If his answers are not full and complete enough, counsel can renew the question in the same or in other form or carry the matter into greater detail. If, on the other hand, his answer is too full or he appears too eager, he may create a prejudice against him which nothing can overthrow, and which the art of counsel upon the other side in cross-examination and in making comments upon his testimony when summing up before the jury, will very effectually use to destroy his weight as an expert.[1]

Scope and Extent of Examination of Expert Witnesses.—Having stated how experts may be summoned and qualified, it remains to consider the scope and extent to which they may be examined.

The advancement of the sciences and the progress of research in special fields of knowledge have made expert testimony of large importance during the present century. The basis of its admission is the fact that there are certain processes of reasoning which an ordinary jury is incapable of performing, even with the assistance of courts and lawyers. Oftentimes in the administration of justice in our courts, proof is given of circumstances which, although admitted, would have little or no significance in the mind of an ordinary juror, and which he would be unable to contrast and compare with other facts, successfully, without the aid of those more familiar with scientific matters and the inductive process of reasoning than he. In such cases it is necessary that the jury should be specially enlightened by persons who have, through training, skill and experience, acquired the power to enlighten them. A common instance and illustration of this matter is to be found in the case of homicide by poisoning. A human body is found dead; externally there may be no *indicia* to show positively the cause of death. Under such circumstances the laws of all civilized countries permit what is called a post-mortem examination by skilled physicians, who, finding no external evidences of the cause of death, are permitted by the officers of the law to remove the internal portions of the body for special and careful exam-

[1] For general rules for the conduct of expert witnesses see *infra*.

ination. If this discloses traces of inflammation or of lesions of an abnormal character, further power is vested in the authorities to have at the expense of the State a chemical examination of the internal organs. If this examination, which is necessarily long and exceedingly technical, results in the discovery of any poisonous substance, such as would produce death, and if it is found in sufficient quantities to produce death, these persons who made the post-mortem examination and discovered the outward indications of the administration and effects of the poison, and the chemists who discovered the poison itself in the tissues of the body, in sufficient quantities to produce death, are called as experts before the jury. The post-mortem examiners explain what the appearance of the body was, as distinguished from the appearances of the body of an individual who had died from natural causes. The chemist describes his course of experimentation, the various deductions which he made from his experiments, the tests which he applied in his investigation in discovering poison, and is then allowed to testify that the poisonous substance was found in sufficient quantities to produce the physical appearances which the post-mortem examiners have described, and to accomplish the death of the human being in whose body the poison was found. It is obvious that the power of observation and the skill, which the skilled chemists and physicians use as the basis of their reasoning in this case, are such as an ordinary man, unskilled and inexperienced, would not possess, and the ability to use them must have come from the study of treatises on such subjects, and from teaching and experience, to such an extent as to entitle the persons so testifying to be considered by the courts as qualified to express an accurate and sound opinion on the matters and things under investigation. Thus it appears how, in such cases, a departure became essential to the successful administration of justice, from the strict rule that witnesses shall testify solely to matters of fact and observation, and why it has long been considered that some witnesses must be allowed to testify to opinions and conclusions.

Again, in a like case, a body is found bearing evidences of wounds or bruises. The question to be determined is whether they were inflicted before or after death; if before death, whether they were sufficient to cause death. Some wounds and

injuries might be sufficiently apparent and dangerous so that the common, inexperienced eye would at once detect that they were sufficient to cause death. But in most instances this is not the case, and in such instances the testimony of experts is required by the necessity of the case, to show that the wounds and injuries were sufficient to cause death.

The General Rules Stated as to Subjects for Expert Testimony.—Hence the general rule is, that wherever the facts to be investigated are such that common experience and knowledge of men do not enable them to draw accurate conclusions, but are such that the study and experience of specialists do enable such specially endowed persons to draw accurate conclusions, then the inferences and deductions they have drawn can be testified to by those who qualify themselves before the court as persons having sufficient skill and experience as such specialists to entitle them to give opinions. The cases in which expert testimony is permitted to be given are set forth in Rogers on Expert Testimony, Sec. 6, quoting from Jones *v.* Tucker (41 N. H., 546), as follows:

"1. Upon questions of science, skill, or trade, or others of like kind.

"2. Where the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such assistance.

"3. Where the subject-matter of investigation so far partakes of the nature of science as to require a course or previous habit of study in order to the attainment of knowledge of it."

So also Chief Justice Shaw of the Supreme Court of Massachusetts, in New England Glass Co. *v.* Lovell (7 Cushing, 319), said:

"It is not because a man has a reputation for sagacity and judgment and power of reasoning that his opinion is admissible in testifying as a witness. If so, such men might be called in all cases to advise the jury, and it would change the mode of trial; but it is because a man's professional pursuit, or his peculiar skill and knowledge of some department of science not common to men in general, enable him to draw inferences where men of common experience, after all the facts have been proved, would be left in doubt."

To the same effect see Muldowney *v.* Illinois Central R. R. Co., 36 Iowa, 472; Wharton on Evidence, Sec. 436; Greenleaf on Evidence, Sec. 441.

Qualifications of this General Rule.—The extent to which an expert witness can go in giving his opinion is limited to matters of science and skill, and does not extend to the expression of views on matters of legal or moral observation, or the manner in which others would probably be influenced if the parties had acted in one way rather than in another. Campbell *v.* Richards, 5 B. & Ad., 345.

So it has been held that the question whether a physician has honorably and faithfully discharged his duty in a given case, either to his medical profession or to his patient, is not a question of science but of pure ethics, upon which the jury is as competent to decide as any one else, and in such a case an opinion would not be allowed to be given either by another medical practitioner or by a professor in the science of morals. Rogers on Expert Testimony, Sec. 11, citing Ramadge *v.* Ryan, 9 Bing., 333.

There are also some matters of fact which apparently transcend the dividing line between common experience and judgment and scientific experience and judgment, as to which expert testimony is not receivable, but the jury and court must weigh the facts and draw the inferences for themselves. An interesting example of this is found in the case of Manke *v.* The People, 78 N. Y., 611 (17 Hun, 410), cited in Stephens' "Digest of the Law of Evidence," p. 107, note H, decided in the New York Court of Appeals a few years ago. In that case one Adolf was killed by a gunshot, and pieces of paper were found near the scene of the homicide bearing certain marks. An expert was called upon to say whether they were powder-marks, and whether the condition of the paper was such that in his opinion it was wadding which had been fired from a gun. This evidence was held to be inadmissible by the General Term of the Supreme Court, and this decision was affirmed by the Court of Appeals. These courts held that the question as to whether this was a wad fired from a gun was a matter which the jury was as competent to judge of as the witness. In delivering the opinion at General Term, Presiding Justice Talcott said that this case was very close to the border line, but in his judgment

it was beyond the province of experts and within the province of jurors.

Nevertheless, in that case the evidence of chemists who had examined the wadding, and had discovered the marks on it which were said to be powder-marks, and upon analysis had determined that they were powder-marks, or that they were marks of powder which had exploded, would have been clearly admissible.

The subjects concerning which medical men may be called upon to testify as experts are as numerous as the diseases, injuries, mental and physical conditions of the human race which fall within the range of the practice of medicine and surgery. It is therefore practically impossible to give them in detail.[1]

Practical Suggestions and Admonitions Embodied in Rules.—It is deemed advisable that the following practical suggestions and admonitions to physicians, concerning their duties as expert witnesses, shall here be given.

First: A physician should refuse to testify as an expert unless he is conscious that he is really qualified as an expert.

Second: After accepting the responsibility, his first duty should be to make a diligent examination and preparation for his testimony, unless it is upon a subject with which he is familiar and which he is satisfied that he has already exhausted, by reading the best authorities that he can find, and by careful reflection upon particular questions as to which his opinion will be asked.

Third: Where he is to make an examination of facts, such as the post-mortem examination of a body, a chemical analysis or an examination of an alleged insane person, he should insist

[1] The principal classes of such subjects may, however, be briefly stated as follows:

1. Causes of death; especially in cases of homicide, suicide, accident, etc., including poisoning.

2. Causes, nature, and extent of personal injuries, by violence, accidents, explosions, railway disasters, collision between vessels, etc.

3. Birth of infants; was infant born dead or alive; if dead, was death the result of natural causes or of internal violence; age of infant at the time of birth or death. Also causes of alleged sterility or pregnancy; time pregnancy has existed; also cases of alleged impotency.

4. Rape, abortion, bastardy, pederasty, onanism, masochism, and many other matters relating to the sexual organs.

5. Malpractice cases, involving the degree of care and skill usual, and that used in the case under investigation, and involving delicate questions as to the propriety of the treatment adopted, etc.

upon having plenty of time and full opportunity for doing his work thoroughly. He should take particular pains to make his examination open and fair, and, if possible, should invite opposing experts to co-operate with him in it.

Fourth: He should be honest with his client before the trial in advising him and giving him opinions, and upon the trial should preserve an absolutely impartial attitude, concealing nothing, perverting nothing, exaggerating nothing.

Fifth: On the preliminary examination as to his qualifications as a witness he should be frank and open in answering questions. He should state fully the extent and the limits of his personal experience and of his reading upon the subject, without shrinking from responsibility, yet without self-glorification.

Sixth: He should be simple, plain, and clear in his statement of scientific facts and principles, avoiding the use of technical language, and trying to put his ideas in such form that they will be grasped and comprehended by men of ordinary education and intelligence.

Seventh: He should avoid stating any conclusions or principles of which he is not certain, but having an assurance that he is right he should be firm and positive. He should admit the limitations of his knowledge and ability. Where a question is asked which he cannot answer, he should not hesitate to say so; but he should refuse to be led outside the subject of inquiry, and should confine his testimony to those scientific questions which are really involved in the case, or in his examination of the case.

Eighth: And finally, he should always bear in mind that at the close of his testimony an opportunity is usually given to him to explain anything which he may be conscious of having said, which requires explanation; and partial statements which need a qualification to make them a truth. This is the physician's opportunity to set himself right with the court and with the jury. If the course of the examination has been unsatisfactory to him, he can then, by a brief and plain statement of the general points which he has intended to convey by his testimony, sweep away all the confusion and uncertainty arising from the long examination and cross-examination, and can often succeed in producing for the first time the impression which he desires

to produce, and can present the scientific aspects of the case briefly and correctly.

Probably no man was ever so gifted as to be able in practice to carry out all of these principles in giving medical testimony. If he could, he would be the ideal expert witness. But the principles are, after all, simple and easily followed in the main. Any physician who knows his subject and who has a clear head and the ordinary faculty of expression, by observing these principles can make himself invaluable as an expert witness. There is no branch of the profession which brings a broader fame, greater influence, or larger emoluments than this. There is no branch, on the other hand, in which men of real ability make more lamentable failures.

CHAPTER VI.

MALPRACTICE.

DEFINITION.—MALPRACTICE may be defined to be—

1st. Wilful acts on the part of a physician or surgeon toward a person under his care, by which such person suffers death or injury;

2d. Acts forbidden by express statute, on the part of a physician or surgeon, toward a person under his care, by which such person suffers death or injury;

3d. Negligent acts on the part of a physician or surgeon in treating a patient, by means of which such patient suffers death or unnecessary injury.

These various divisions will be considered in the order in which they are above set forth.

Wilful Malpractice.—The cases which fall within the first two divisions of this definition are such acts as render the medical man liable to punishment in a criminal prosecution, and may not necessarily, although in some instances they may, constitute grounds of liability in a civil suit against him.

As examples of the first class of cases may be cited those instances, happily not numerous in the annals of the profession, where a physician or surgeon when treating a female patient has had carnal connection with her, representing that he was using that method of treating her to cure her disease. Such a case was Reg. *v.* Case, 1 Eng. Law & Eq., 544 (s. c., 1 Den. C. C., 580).[1]

Honest Intent no Defence in Such Cases.—In Reg. *v.* Reed, 1 Den. C. C., 377 (s. c., 2 Car. & K., 967), it was contended as a defence that the defendant really believed that he was curing his patient by treating her in this extraordinary way. The Court, per Wildes, C. J., brushed aside this conten-

[1] See also 1 Bishop Crim. Law, sec. 36; Rex *v.* Romiski, 1 Moody, 19; Reg. *v.* Ellis, 2 Car. & K., 470.

tion with scorn, saying: "The notion that a medical man may lawfully adopt such a method of treatment is not to be tolerated in a court of justice;" and in this case and in others, convictions have been sustained for the crime of rape or of attempting to commit rape.[1]

Another example of wilful malpractice would be wilful neglect of a patient by his medical attendant, who became intoxicated voluntarily, though this will generally come under the second subdivision, as most states and countries have enacted statutes making it a criminal offence to practise medicine or surgery when intoxicated.

Acts Forbidden by Statute.—Within the second subdivision of the definition, or acts declared unlawful by statute, fall the cases of committing or attempting to commit an abortion, and cases of prescribing for or treating a patient by one voluntarily intoxicated. If the abortion is attempted without the knowledge or consent of the woman, and under the pretence of performing a necessary operation upon her to cure disease, undoubtedly the physician would be liable to a criminal prosecution by the State for the offence of committing an abortion and to civil action by her to recover damages. If the abortion was committed with her consent, while she would have no right of action against him for damages, he would be liable to criminal prosecution under the statute.

Abortion Not a Crime by the Common Law.—At common law it was not a crime to commit an abortion with the mother's consent if the child had not quickened. In Mitchell *v.* Com., 78 Ky., 204 (s. c., 39 Am. Reports, 227), the Court, per Hines, J., says: "After a patient investigation we are forced to the conclusion that it was never called a punishable offence at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the very act of delivery." See also Evans *v.* People, 49 N. Y., 86.

The inhumanity and danger to society of this rule became manifest at a very early period, and both in England and in

[1] In such cases as these the patient would have a right of action in the civil courts for damages against the physician or surgeon, because he had taken wilful and wicked advantage of his professional relation to her, to do her a grievous wrong.

this country statutes were adopted, varying somewhat in the degree and kind of punishment and in the nomenclature of the crime, but all of them making the offence of committing an abortion, no matter at what stage of gestation, a crime.[1]

The Common-Law Doctrine Criticised.—Professor Elwell in his valuable work on "Malpractice, Medical Evidence and Insanity," pp. 250, 251, makes the following remarks upon this subject: "The idea once existed quite generally, and it still exists to some extent, that there is no offence in destroying the embryo or fœtus before there is a manifest knowledge of life by the mother, derived from motion of the child called 'quickening.' How absurd to suppose that there is no life until the mother can feel the muscular motions of the child! As well might we deny the vitality of the blood because it cannot be felt. The muscular tissues, and even the bones to which they are attached, must have some degree of substance before there can be motion, and of course this development depends upon life. Though this foolish notion is now fully exploded in medicine, it still lingers in the popular mind, and doubtless leads to much crime. The life of the fœtus or embryo immediately after conception is just as positive physiologically as at any subsequent period. Quickening being an incident or sign in the course of development of the fœtus, it indicates not the commencement of a new state of existence, but only a new manifestation of pre-existing life. . . . It is uncertain in its appearance, sometimes coming on at three months, sometimes at six months, and sometimes not at all."

Legal Definitions of Terms, "Quick with Child," etc.—In Evans *v.* People, 49 N. Y., 86, following R. *v.* Wycherly, 8 C. & P., 262, it was held that a woman is "quick with child" from the period of conception after the commencement of gestation, but is "pregnant with quick child" only when the child has become "quickened in the womb." This distinction has been discussed in State *v.* Cooper, 2 Zab., N. J., 52, and since the Evans case, the same court in New York State has held that the expression, "woman with child," means "pregnant wo-

[1] The Pennsylvania courts at an early period refused to follow this common-law doctrine, and held that the moment the womb is instinct with life in embryo and the process of gestation has begun the crime may be perpetrated. Mills *v.* Com., 13 Pa. St., 631.

man." Eckhardt *v.* People, 83 N. Y., 42 (s. c., 38 Am. Rep., 462).

Death of Child by Abortion.—If, in attempting to produce an abortion, the child is caused to be born alive but before the end of the period of gestation, and when it is not capable of sustaining life, and it dies, the person producing the abortion and bringing the child into the world at this time and in this manner is guilty of murder. Wharton's Crim. Law, sec. 942; Rex. *v.* West, 2 Cox Crim. Cases, 500; Com. *v.* Brown, 14 Gray, Mass., 419.

Death of Mother by Abortion.—So also where in consequence of producing an abortion the death of the mother occurs, the person producing the abortion is guilty of murder at common law. 4 Blackstone's Com., 201; 1 Bishop's Crim. Law, 328. In some of the States, however, these offences are declared to be only manslaughter.

Further consideration of the subject of abortion will be had under that title in another part of this work.

Statutes Generally Except Abortions Necessary to Save Life.—It should be noted here, however, that nearly all the statutes which define and punish the crime of abortion, or the crime of manslaughter or murder committed in consequence of abortion, declare that when it is necessary to produce a miscarriage in order to save life, the act of doing so is excepted from the effect of the statute.

Negligent Malpractice.—Under the third subdivision of the definition, viz., when by reason of the negligent acts on the part of the physician or surgeon the patient suffers death or unnecessary injury, may be placed the most numerous cases of malpractice, according to the generally accepted meaning of the term.

Criminal Liability for Negligent Malpractice.—It is manifest that not every degree of negligence which causes death or injury ought to render the physician or surgeon liable to indictment and punishment for a crime. The general theory of the criminal law is based upon the doctrine that in order to constitute a crime there must be either an intent to do the wrong, or such a degree of negligence in the performance of a given act as to supply the place of the intent to do wrong, and require punishment for the protection of society, upon the ground that the carelessness of the defendant is so great as to

make it necessary and proper to punish him, in order to deter others from following his example.

Doctrine of Leading Case of Com. v. Thompson.—In Com. *v.* Thompson (6 Mass., 134), Parsons, C. J., observes: "There was no evidence to induce the belief that the prisoner by his treatment intended to kill or injure the deceased and the ground of express malice must fall. It has been said that implied malice may be inferred from the rash and presumptuous conduct of the prisoner in administering such violent medicines. Before implied malice can be inferred, the judges must be satisfied that the prisoner by his treatment of his patient was wilfully regardless of his social duties, being determined on mischief. . . . To constitute manslaughter, the killing must have been the consequence of some unlawful act. Now there is no law which prohibits any man from prescribing for a sick person with his consent; and it is not a felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient, contrary to his expectations, should die. The death of a man killed by voluntarily following a medical prescription cannot be adjudged felony in the party prescribing unless he, however ignorant of medical science in general, had so much knowledge or probable information of the fatal tendency of the prescription that it may be reasonably presumed by the jury to be an act of wilful rashness at least, and not of honest intention and expectation to cure."

This lax statement of the law, made by the learned chief justice in this case, has been much doubted and criticised. It appears to be unsound in the length to which it goes in requiring, in order to constitute criminal liability, what may be termed excessive gross carelessness or wilful gross carelessness. It apparently runs counter to the prevailing opinions of the English judges, and to the later decisions of the courts in the United States, although it is followed and approved in Rice *v.* The State, 8 Mo., 561.

In Rex *v.* Long (4 Car. & P., 308–310), Park, J., said: "I call it acting wickedly when a man is grossly ignorant and yet affects to cure people, or when he is grossly inattentive to their safety."

So in Rex *v.* Spiller (5 Car. & P., 353), the Court said: "If

a person, whether a medical man or not, professes to deal with the life and health of another, he is bound to use competent skill and sufficient attention; and if he causes the death of another through gross want of either he will be guilty of manslaughter."

Bishop, in his work on Criminal Law, lays down the rule that not every degree of carelessness renders a practitioner liable to criminal prosecution, and that it must be gross, or, as more strongly expressed, "the grossest ignorance or most criminal inattention." [1]

Nevertheless he quotes with approval (2 Bishop Crim. Law, 264) the remark of Willes, J., that a medical man is taking a leap in the dark if he knew he was using medicines beyond his knowledge; and also the remarks of Bayley, J., in Rex *v.* Simpson (1 Lewin, 172), who said in that case: "I am clear that if a person not having a medical education, and in a place where a person of a medical education might be obtained, takes it upon himself to administer medicines which may have an injurious effect, and such medicines destroy the life of the person to whom they are administered, it is manslaughter. The party may not mean to cause death, or the medicine may produce beneficent effects, but he has no right to hazard medicine of a dangerous tendency when medical assistance can be obtained. If he does, he does it at his peril." [2]

Gross Negligence Defined.—In general it may be stated that gross negligence is necessary to constitute criminal liability, but this may be predicated upon, or inferred from, such want of ordinary care and skill as shows gross ignorance, or such want of attention as indicates wilful disregard of the well-known laws of life and health.[3]

Gross Negligence Resulting in Injury a Misdemeanor.—It has also been held that although death does not but in-

[1] 1 Bishop Crim. Law, sec. 217, citing Rex *v.* Williamson, 3 Car. & P., 635.

[2] The same learned and philosophical text-writer (2 Bishop Crim. Law, sec. 664) compares the English and American cases and declares that the difference between them is more apparent than real.

[3] See Rice *v.* The State, 8 Mo., 561; Fairlee *v.* People, 11 Ill., 1; Holmes *v.* State, 23 Ala., 17; Rex *v.* Spilling, 2 M. & Rob., 107; Ferguson's Case, 1 Lew., 181; Thomas *v.* Winchester, 2 Selden, N. Y. Court of App., 397; Com. *v.* Pierce, 138 Mass., 165, and cases cited; State *v.* Hahn, 38 Ark., 605; Wharton's Crim. Law, sec. 1015; Elwell on Malpractice, etc., 238, 239.

jury does ensue, as the result of gross negligence or inattention, that constitutes a misdemeanor punishable criminally.[1]

In Determining Degree of Negligence Circumstances and Conditions Govern.—It should be noted, however, that the circumstances and conditions attending the act of alleged criminal malpractice should be given much weight. So also should due weight be given to the advancement of knowledge and education in the world in general, and in the medical profession in particular. In an early English case, one of the judges remarked that not as much knowledge and skill could be expected of a surgeon or physician in a sparsely settled country district as in a city, and that he was at a loss to know what degree of knowledge and skill should be required of such a person. But in Gram *v.* Boener, 56 Ind., 447, Worden, J., said: "It seems to us that physicians or surgeons practising in small towns, or in poorly or sparsely settled country districts, are bound to possess and exercise at least the average degree of skill possessed and exercised by the profession in such localities generally. It is not true, as we think, to say that if a physician and surgeon has exercised such a degree of skill as is ordinarily exercised in the particular locality in which he practises, that would be sufficient. There might be but few practising in the given locality, all of whom might be quacks, ignorant pretenders to knowledge not possessed by them, and it would not do to say that because one possessed and exercised as much skill as the other, he could not be chargeable with the want of reasonable care and skill." [2]

Unlicensed Practitioner Causing Death Guilty of Manslaughter.—Since the adoption by most civilized states and countries of the salutary practice of regulating by statute the practice of medicine and surgery, and forbidding persons not duly licensed from practising, and making it a misdemeanor to violate any of these statutes, it is clear that any person not having the requisite medical education and a license, who attempted to administer drugs and medicines or to perform op-

[1] 1 Bishop Crim. Law, sec. 558, citing Groenvelt's case, 1 Lord Raymond, 213; Rex *v.* Long, 4 C. & P., 398.

[2] See also Kelsey *v.* Hay, 84 Ind., 189; Small *v.* Howard, 128 Mass., 131; Gates *v.* Fleisher, 67 Wis., 286; Smothers *v.* Hanks, 34 Iowa, 286; Almond *v.* Nugent, 34 Iowa, 300; Haire *v.* Reese, 7 Phila. (Pa.), 138; Nelson *v.* Harrington, 72 Wis., 591; and see also article on "Legal Status of Physicians," etc., in this vol., p. 30 *et seq.*

erations, and through want of ordinary knowledge and skill caused the death of another, would be held guilty of manslaughter, because he brought about the death while he himself was engaged in a violation of the law. In some states where no discrimination in this respect is made between misdemeanors and felonies, the crime would be murder, punishable by death; and it has always been the law that an empiric or quack holding himself out as a regular physician is bound to have and exhibit the degree of skill and care which he professes, and will be strictly held to the standard of skill of educated and licensed medical men.[1]

As to the legal meaning of the term "ordinary care and skill," and the rules of evidence applicable in cases of malpractice, a full discussion will be had below, when considering the subject of civil liability for malpractice.

Civil Liability for Malpractice.

Any person holding himself out to be a physician or surgeon, or any physician or surgeon, who is guilty of malpractice, is liable for damages, to be recovered in a civil action, instituted by the person injured, or by those having a legal right to such person's services. This is so whether the injured person actually employed the defendant to prescribe or treat him, or not. The liability flows out of the relationship, without regard to the element of employment, and it may result from negligence in treatment, or in prescribing, or in giving information and instructions to the patient as to how to take care of himself when under treatment. The rules of law applicable to the duties of a physician to his patient are stated and the authorities supporting them cited in Chapter VI. of this article.[2]

Ordinary Care and Skill Only Required.—The leading cases in America on the subject of civil liability for malpractice are: Leighton *v.* Sargent, 7 N. H., 460, and Carpenter *v.* Blake, 60 Barb., 485 (s. c. on appeal, 75 N. Y., 12). In the former case the Court said: "In a science encumbered

[1] Ruddock *v.* Low, 4 F. & F., 519; Musser *v.* Chase, 29 Ohio St., 577.

[2] See particularly Gieselman *v.* Scott, 25 Ohio St., 86; Lanphier *v.* Phipos, 8 C. & P., 475; Pym *v.* Roper, 2 F. & F., 783; Carpenter *v.* Blake, 60 Barb., 485, 50 N. Y., 696, 10 Hun., 358, 75 N. Y., 12; Leighton *v.* Sargent, 7 N. H., 460; Pike *v.* Honsinger, 155 N. Y., 201, and cases cited.

with so many sources of error and difficulties, it is obvious what cause we have for proceeding with the utmost caution, and for advancing from step to step with the greatest circumspection. It is in consideration of those peculiar difficulties that beset and encompass the physician and surgeon, that all enlightened courts have held that but ordinary care and skill shall be required of them, and that mere errors of judgment shall be overlooked, if the general character of treatment has been honest and intelligent, and that the result of the case shall not determine the amount of the responsibility to which he is held; and that when unskilfulness or negligent treatment of his patient is charged to a surgeon, it is not enough to show that he has not treated his patient in that mode or has not used measures which in the opinion of others, though medical men, the case required; because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as it goes to prove a want of reasonable skill and care for which he may be responsible. Alone it is not evidence of the latter, and therefore a party must go further and prove, by other evidence, that the defendant assumed the character and undertook to act as a physician without the education, knowledge, and skill which entitled him to act in that capacity."

In Carpenter *v.* Blake, upon the last appeal (75 N. Y., 12), it was said that the reasonable ordinary care and diligence which the law requires of physicians and surgeons is that which persons engaged in the same general line of practice have and exercise in like cases.[1]

Story's Statement of the Rule.—Story in his work on Bailments, p. 433, with his usual felicitous method of statement says: "In all cases where skill is required it is to be understood that it means *ordinary* skill in the business or employment which the bailee undertakes; for he is not presumed to undertake for extraordinary skill, which belongs to a few men only in his business or employment, or for extraordinary endowments or acquirements. Reasonable skill constitutes the measure of the engagement in regard to the thing undertaken."

Occult Influences Should be Considered by Lawyers and

[1] Synonymous terms with "reasonable care" are "fair knowledge and skill," Jones *v.* Angell, 95 Ind., 376; "ordinary care and skill," Heath *v.* Glisan, 3 Oregon, 64.

Judges.—In this connection it should be borne in mind by lawyers and judges, that in the case of a physician treating disease, or a surgeon repairing an injury, occult influences frequently play a most important part. Professor Elwell in his work on Malpractice, etc., p. 25, lays great stress on this element of uncertainty. He says: "In the case of physicians, surgeons, attorneys, etc., another and important element besides skill enters into the result, and for this reason the degree of responsibility is to a certain extent and in a manner indicated and influenced. This important element is the operation of causes and influences over which the practitioner has but little or no control. They are occult, and no human foresight is able to anticipate them before they have completely deranged and materially interfered with his plans by bringing about a different result than that confidently depended upon."[1]

Change and Advancement in Medical Knowledge also to be Considered.—It should on the other hand be clearly understood that the constant change and improvement which are going on in medical and surgical education, in the discovery of new remedies and new methods of treatment, and in the invention of new instruments, tend constantly to elevate the average skill and intelligence of the profession, and with them the standard by which the courts will determine liability for negligence. What would have been, but a few years ago, fully recognized by the courts as ordinary skill in the treatment of disease and the performance of operations, would now be regarded as antiquated and less than ordinary skill, because of the advancement in the knowledge of means which can be devoted to the treatment of disease and injury.[2]

We have already seen that what is the degree of skill to be required of one practising in a small town or a country district sparsely inhabited, and what is required in the case of a city practitioner, may differ to some extent with the circumstances. Quacks and pretenders, however, must be judged by the standard of regular practitioners.[3]

[1] See Corsi *v.* Maretzek, 4 E. D. Smith, 1, quoted at p. 362 of this volume.

[2] Small *v.* Howard, 128 Mass., 131, and cases cited.

[3] Clairvoyancy of course is not recognized in the courts as medical or surgical practice.. And any one professing to treat patients as a clairvoyant must be held to the standard of regular practising physicians in the neighborhood where the clairvoyant operates. Nelson *v.* Harrington, 72 Wis., 591; Bibber *v.* Simpson, 59 Me., 181; Musser *v.* Chase, 29 Ohio St., 577.

Degree of Care and Skill a Mixed Question of Law and Fact.—What constitutes reasonable care and skill is a mixed question of law and fact, like any other question of negligence. Where the evidence is undisputed and no conflicting inferences can be drawn from the facts presented, it is the duty of the Court to determine whether or not there is sufficient proof of want of ordinary care and skill to be submitted to the jury. Where, however, the evidence is conflicting on that point, or the inferences to be drawn from the facts established might be differently drawn by different men having the same opportunity for observation, and the same circumstances before them, it is for the jury to say whether or not the defendant has exercised reasonable care and skill, guided by proper directions from the Court as to the measure of skill required. This involves the question as to how far the practitioner is bound to be familiar with the methods, appliances, drugs, and methods of treatment of his profession in general.[1]

Experimentation Not Permissible.—Experimentation, whether upon charity patients or pay patients, is equally prohibited by well-settled rules of law. In other words, a departure from known methods of treatment for the purpose of or by way of trying unknown remedies, or operations not usually adopted by the profession, if an unfortunate result occurs, renders the defendant liable (McNevins *v.* Lowe, 40 Ill., 209).

Liability of Charitable Institutions and Physicians Treating Patients Therein.—In Massachusetts it has been held that a public charitable institution is not liable for the negligence of its employees and agents without proof that it has been negligent in selecting them.[2] This ruling has been

[1] McCandless *v.* McWha, 22 Pa. St., 261; Carpenter *v.* Blake, *supra;* Leighton *v.* Sargent, *supra;* and see also Cayford *v.* Wilbur, 86 Me., 414; Van Spike *v.* Potter, 53 Neb., 28, s. c., 73, N. W. Rep., 295; Whitesell *v.* Hill (Iowa), 66 N. W., 894; 70 *id.*, 750; Dunbald *v.* Thompson, 109 Iowa, 199; Ewing *v.* Goode, 78 Fed., 442; Martin *v.* Courtney (Min.), 77 N. W., 813; Matthews *v.* Woolley, 69 Ill. App., 654. In New York the rules laid down in Carpenter *v.* Blake and McCandless *v.* McWha as to the duties and liability of physicians have been reaffirmed in Pike *v.* Honsinger, 155 N. Y., 201; and see also Joggle *v.* Allen, 24 App. Div., 594; Geaken *v.* Plimpton, 62 *id.*, 35. And if a physician is called upon to examine a person and give information as to his physical condition, for example as to whether a young man about to marry had a venereal disease, and negligently gives wrong information, he is liable. Harriott *v.* Plimpton, 166 Mass., 565; and see also Logan *v.* Field, 75 Mo. App., 594.

[2] McDonald *v.* Mass. General Hospital, 120 Mass., 432.

criticised and a broad rule of liability to the same extent to such patients as to a private person laid down, in a very well-considered case in Rhode Island;[1] but the Massachusetts rule has been followed in several New York cases,[2] which, however, maintain the general rule that a charity patient has the same right of recovery against a physician or attendant personally, in such institutions, as a paying patient.

Measure of Damages.

The measure of damages in cases of malpractice may vary with the kind of malpractice. In the case of wilful malpractice, the element of gross negligence justifies punitive or retaliatory damages in those States where any such damages are allowed. That is, damages which will not only compensate for the injuries inflicted, but which will, by punishing the wrong done, tend to repress similar acts in the future. The tendency of the courts and of legal authority of the present time is, however, to limit as often as possible the cases in which punitive damages are allowed, upon the theory that if a grossly negligent act is committed it will require criminal prosecution, and that the strong arm of the State should be invoked to punish the wrong, rather than to line the pocket of the injured person.

On the other hand, in cases of malpractice, damages for want of ordinary care and skill are recompensed as in any other cases of negligence. They may include loss of time of the patient, inability to earn his living, such sum as the jury thinks is reasonable to be given as a compensation for the extra pain and suffering, and, where the injury is permanent, such further sum as will indemnify the patient for the injury or deformity which he may suffer on account of the defendant's neglect. Citation of authority upon this question of damages is almost unnecessary, but some of the cases are collected in the note below.[3]

[1] Glavin *v.* R. I. Hospital, 12 R. I., 411.

[2] Van Tassel *v.* Manhattan Eye and Ear Hospital, 39 N. Y. State Rep., 71, 60 Hun., 585; Harris *v.* Woman's Hospital, 39 N. Y. State Rep., 98, 27 Abb. N. C., 37; Haas *v.* Missionary Soc., 6 Misc. (N. Y.), 281; Joesl *v.* Women's Hospital, 96 Hun, 73; Dubois *v.* Decker, 130 N. Y., 325; see also Doyle *v.* N. Y. Eye and Ear Infirmary, 80 N. Y., 631; Pryor *v.* Manhattan Eye and Ear Hospital, N. Y. Law Journal, Nov. 25, 1890; Fire Ins. Patrol *v.* Boyd, 120 Penn. St., 624; O'Brien *v.* Cunard Steamship Co., 154 Mass., 272.

[3] Kelley *v.* Hay, 84 Ind., 189; Stone *v.* Evans, 32 Minn., 243; Teft *v.* Wilcox, 6 Kans., 646; Brooke *v.* Clark, 57 Tex., 105; Graunis *v.* Branden, 5 Day (Conn.), 260, s. c., 5 Am. Dec., 143; Wenger *v.* Calder, 78 Ill., 275; Carpenter *v.* Blake, 75

Liabilities of Partners, etc.—It has been held that where two physicians were partners, and one of them committed an act of negligent malpractice, both were liable in a civil court for damages.[1]

But the declarations of the partner who is guilty of the negligent act, made as to the act committed, and in the absence of the other partner, are not admissible as against the other partner. And so also is the rule as to declarations of the partner who committed the act after its commission as to the propriety of the treatment, and opinions expressed by him in reference thereto.[2]

It has also been held that one surgeon who recommends the employment of another during his absence from town is not liable for acts committed during his absence.[3]

Suits for Injuries to Married Women and Minor Children.—When the person injured is a married woman, her husband may sue for loss of services on account of malpractice, and when the injured person is a minor child the parent may sue as in any case of negligence. A third person, such as the husband of a woman injured by malpractice, or the father of minor child so injured, can only recover the value of the services thereby lost, and in some cases the enhanced expense of medical attention and nursing thereby rendered necessary.

Inspection of the Injured Person at or Before the Trial.—In an action in which the injury is to a portion of the body which may be seen, such as the shortening of a limb on account of improper treatment of a fracture, the limb may be exhibited to the jury.

It has been much discussed whether the defendant in a malpractice or other negligence case can compel the plaintiff to

N. Y., 12. And see also Moon *v.* McRae, 111 Ga., 206. In Lathrope *v.* Flood (Cal.), 63 Pac., 1007, it was held that a verdict of $2,000 in a case in which a physician abruptly left a case of childbirth because the patient would not submit to the use of instruments which he mistakenly deemed necessary, and this although only two hours elapsed before another physician came, and the patient apparently had suffered no actual injury. In Moon *v.* McRae *supra* it was held that the plaintiff in malpractice cases may recover for pain and suffering independently of other damage. And see also Miller *v.* Frey (Neb.), 68 N. W., 630.

[1] Hyrne *v.* Irwin, 23 S. Car., 226, s. c.; 55 Am. Rep., 15; Whittaker *v.* Collins, 34 Minn., 209.

[2] Boor *v.* Lowrey, 103 Ind., 468.

[3] Hitchcock *v.* Burgett, 38 Mich., 501.

permit his person to be examined by physicians before trial, to enable the defendant to know the full extent of the injury so far as it is perceptible. In the latest cases the examination of plaintiff before trial was not allowed unless expressly permitted by statute.[1]

In 1877 the Supreme Court of Iowa in the case of Schroder *v.* C., R. I. & P. R. R. Co., 47 Iowa, 375, held that the court had inherent power and jurisdiction to compel the plaintiff to submit to such an examination.

This decision has been followed by the courts of several of the western and southern States, while in others the power has been denied. These cases will be found fully collected in Roberts *v.* O. & L. C. R. Co. and in U. P. R. R. Co. *v.* Botsford cited above.

The ground of the decision of the United States Supreme Court and of the New York Court of Appeals seems to be, that in the absence of legislative provision permitting a court to order such an examination, it has no inherent power to do so, and did not derive any such powers from the common-law courts of England, which never had exercised such powers.

In some of the cases which deny the right to compel such examination, it is claimed that if such a statute was passed as would confer upon the courts power to compel such an examination, the statute would be unconstitutional, and much is said in those decisions about the sacredness and immunity of the person. It seems difficult, however, to understand why such statutes should be considered as differing in any respect from statutes permitting orders for the examination of witnesses and parties before trial, or for the discovery and inspection of books and papers, and the like, which statutes have been enacted for many years and have never been held to be unconstitutional. Surely an honest suitor having a just claim for damages for personal injuries would not object to such an examination, because the result would often strengthen his case, while a dishonest suitor having a false and unmeritorious claim ought to be exposed and have his false claims defeated, in the inter-

[1] See U. P. R. R. Co. *v.* Botsford, 141 U. S., 250; McQuiggan *v.* D., L. & W. R. R. Co., 129 N. Y., 50; Roberts *v.* O. & L. C. R. Co., 29 Hun, 154, and cases cited. See this subject fully discussed in article on "When Medical Examination of Living Human Body is Required or Permitted in Courts of Law," vol. ., p. of this treatise.

ests of justice and truth. On the other hand, a suitor who was honestly mistaken in his belief that he had been disfigured or injured by an act of malpractice might often discover his mistake, and be saved the annoyance and expense of defeat after a trial in open court.

Some of the most frequent cases of alleged malpractice, brought before the courts, are those in which it is claimed that a fractured limb has been improperly set, with the result that it becomes crooked or shortened; when the fact is, as is conclusively shown by Prof. Frank H. Hamilton in a paper published by him many years ago, and quoted with approval by Professor Elwell, in his work on Malpractice, etc., that the percentage of cases, in certain kinds of fractures, in which perfect results are obtained by even the most eminent surgeons, is very small. In such cases as these the true state of affairs might often be disclosed by careful inspection prior to the trial. On the whole more good than harm would seem to be the probable outcome of permitting such examinations, in malpractice cases, if not in all cases of alleged personal injuries.

Evidence in Malpractice Cases.—The prevailing trial practice in malpractice cases is to prove the condition of the patient prior to the employment of defendant and at the time the treatment in question began, the methods of treatment adopted, and instructions given, and the condition of the patient during and after such treatment, and then to place other physicians on the witness-stand, and put to them hypothetical questions involving the facts as established by the evidence, and calling upon them to state whether the method of treatment adopted indicated proper skill and care, or even the usual and recognized methods of the profession.[1]

In some States evidence of the general reputation of the defendant for skilfulness or the contrary is held admissible. In other States such evidence is held inadmissible (see Vol. XIV., Am. and Eng. Encyclopædia of Law, p. 83, and cases collected in Note 6).

Contributory Negligence.—In conclusion it should be stated that the patient is bound to follow obediently all proper directions given him by his physician or surgeon, as to his diet, mode of life, time of taking and quantity of medicine to

[1] Olmstead *v.* Gere, 100 Pa. St., 127; Carpenter *v.* Blake, *supra.*

be taken, or the care of a diseased or injured member. Any disobedience of such directions which contributes to prevent a recovery will bar him from his right of action for malpractice, even though the medical man may have been somewhat negligent.[1]

[1] This subject has been recently considered in Richards *v.* Willard, 176 Pa. St., 181; and it was held that if the injuries were attributable to negligent act of the patient, in thai case leaving the hospital with a broken leg only partly healed, the patient cannot recover. And see also Pike *v.* Honsinger, 155 N. Y., 201 *supra*.

THE LAW OF EVIDENCE

CONCERNING

COMMUNICATIONS

BETWEEN

PATIENT AND PHYSICIAN.

BY

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EVIDENCE OF COMMUNICATIONS BETWEEN PATIENT AND PHYSICIAN.

PRIVILEGED COMMUNICATIONS.

COMMUNICATIONS between patient and physician may become pertinent to matters under investigation in judicial tribunals. They are sometimes, nevertheless, excluded by law from disclosure in evidence; they are then termed *privileged* communications. When such a disclosure is forbidden it is stated to be for reasons of public policy,[1] "because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it."

EVIDENCE OF COMMUNICATIONS BETWEEN PATIENT AND PHYSICIAN UNDER THE RULES OF COMMON LAW.

Although the common law required an inviolable secrecy to be observed by attorneys with reference to the communications which they had received from their clients,[2] still protection from disclosure in evidence in a court of justice was not extended to communications between a patient and his medical adviser.[3]

[1] Greenleaf Ev., s. 236; Taylor Ev., s. 908; Bouvier's Law Dictionary, p. 363; Am. and Eng. Enc. of Law, 1st ed., vol. 19, p. 122; Code Civ. Pro. Cal., s. 1881; Mills' Ann. Stats. of Col., 1891, s. 4,824; Rev. Stats. Idaho, 1887, s. 5,958; Gen. Stats. Minn., 1891, s. 5,094; Comp. Stats. Mont., 1887, s. 650; Gen. Laws Ore., 1892, s. 712; Comp. Laws Utah, 1888, s. 3,877.

[2] Taylor Ev., s. 911; Stephen, Dig. of Ev., art. 115; Greenleaf Ev., s. 237.

[3] The successive efforts made to extend protection by judicial ruling to communications between patient and physician will appear from a consideration of the cases that are usually cited as authority for the English rule: Annesley *v.* Earl of Anglesea (1743), 18 How. St. Tr., 1,139; Duchess of Kingston's case (1776), 20 How. St. Tr., 355 (cf. p. 572, p. 585, p. 586, p. 613); Wilson *v.* Rastall (1791), 4 Term R. (Durnford & East), 753; Rex *v.* Gibbons (1823), 1 C. & P., 97; Broad *v.* Pitt (1828), 3 C. & P., 518; Greenough *v.* Gaskell (1832), 1 My. & K., 98. See also Wheeler *v.* Le Marchant, 50 L. J. Ch., 795 (1880).

1 Phillips Ev., p. 136; Starkie Ev., p. 40; Wharton Ev., s. 606; Greenleaf Ev., secs. 248, 237, 239; Taylor Ev., s. 916; Stephen, Dig. of Ev., art. 115; Rogers' Expert

Reasons for the Distinction at Common Law between Communications to Legal and Medical Advisers.—It does not clearly appear, in any of the cases usually cited as authority, why the distinction is made between legal and medical advisers, but it is apparent that the privilege does not rest upon considerations of honor nor of confidence,[1] nor even upon the urgency of the situation under which the communication is made; for disclosures are made to a physician frequently to save life, or to a priest for reasons of very solemn import, while those made to an attorney insure at most protection from temporal annoyance. The privilege of attorneys seems to be founded upon considerations of public policy in the administration of justice in the courts; attorneys are a part of the system,

Testimony, s. 45; Reynolds' Theory of Evidence, s. 86; 3 Rice Evidence, s. 209.

It is to be noted that none of the cases which are cited as authority for the common-law rule as usually stated are really precedents to that extent. The cases of the Duchess of Kingston (*supra*); Lord William Russell (9 How. St. Tr., 602); Dr. Ratcliff (9 How. St. Tr., 582); Earl Ferrers (19 How. St. Tr., 886), and Rex *v.* Gibbons (*supra*), were all criminal prosecutions; and in Annesley *v.* Anglesea, Wilson *v.* Rastall, Broad *v.* Pitt, and Greenough *v.* Gaskell (*supra*), which were civil causes, the question of the privilege of a medical man was not really in dispute. It is well settled that communications between attorney and client are privileged, and yet Judge Pitt Taylor expresses some doubt whether the protection cannot be removed without the client's consent in cases where the interests of *criminal justice* require the production of the evidence (Taylor Ev., s. 929). This intimation of a distinction between criminal and civil actions, even in the case of attorneys, suggests the possibility of a difference between those two classes of actions in the case of medical men. The cases cited establish authoritatively that in criminal prosecutions, at common law, confidential communications between patient and medical man are not privileged; but in civil causes, the opinions of the eminent judges seem to be *obiter dicta*. It is, however, established by other decisions that mere confidential relations do not prevent the disclosure of communications. (For the case of *bankers*, see Loyd *v.* Freshfield, 2 C. & P., 325; *managers*, Anderson *v.* British Bank of Columbia, 45 L. J. Ch., 449; *clerks*, Lee *v.* Burrell, 3 Camp., 337; Webb *v.* Smith, 1 C. & P., 337; *stewards*, Vaillant *v.* Dodemead, 2 Atk., 524; Earl of Falmouth *v.* Moss, 11 Price, 455; *Pursuivant of Herald's College*, Slade *v.* Tucker, 49 L. J. Ch., 644; *masons* and *members of secret societies*, Owens *v.* Frank, 7 Wyo., 457 (1898); *solicitor of patents*, Brungger *v.* Smith, 49 Fed. Rep., 124 (Circuit Court of U. S. Dist. of Mass., 1892); *bank examiner*, Cox *v.* Montague, 78 Fed. Rep., 845 (U. S. C. C. A., 6th Cir., 1897); *letter carrier*, Smith *v.* Smith, 45 Atl. Rep., 848 (Del. Super., 1899).

The opinions of so many eminent men, though strictly speaking *obiter dicta*, together with the uniform statements of text-writers based upon them, leave no room for reasonable doubt that independent of statute, in civil as well as criminal causes, communications between patient and medical adviser are not entitled to protection from disclosure in evidence.

[1] See Duchess of Kingston's case (*supra*, p. 91, note 3) 'cf. *ib.*, pp. 572, 585, 586, 613).

as are grand jurors, petit jurors, and judges,[1] and even arbitrators;[2] but physicians are no part of that system, and a disclosure of confidences made to them in no way tends to weaken the system or render it ineffectual, while the compulsory examination of lawyers would tend to the suppression of the truth in litigation by discouraging confidence between attorney and client. This, perhaps, can be assigned as the reason for the distinction; a distinction which does not differentiate lawyers from physicians, but agents in the administration of justice from all others.[3]

Criticism of the Common-Law Rule.—Though the privilege of attorneys was adopted to enforce respect for the law as securing the rights of persons entitled to its protection, by establishing inviolable confidence between them and the officer who represents them in their dealings in the law, and though it was not the purpose of the law to enforce sentiment or to elevate one profession above another, the sentimental idea did not suffer neglect for the want of advocates. Justice Buller lamented the narrowness of the common-law rule,[4] and Mr. Best has criticised it as harsh in itself, of questionable policy, and at variance with the practice in France and the statute law in some of the United States of America.[5]

[1] Greenleaf Ev., secs. 249, 252, 252a.

[2] Greenleaf Ev., s. 249.

[3] See Barnes *v.* Harris, 7 Cush., 576; Hatton *v.* Robinson, 4 Pick, 422. See also historical review of the attorney's privilege and the reasons for it, by Judge Selden, in Rochester City Bank v. Suydam, 5 How. Pr. (N. Y.), 254, and in Whiting *v.* Barney, 30 N. Y., 330.

[4] Wilson *v.* Rastall, 4 Term R., 753.

[5] Best, Prin. of Ev., s. 582.

The revisers of the New York Statutes in 1828 in their report (5 N. Y. Stats. at Large, edited by John W. Edmonds, 2d ed., p. 726) stated as their reason for suggesting a statutory privilege for communications between physician and patient, that "in 4 Term Rep., 580, Buller, J. (to whom no one will attribute a disposition to relax the rules of evidence). said it was 'much to be lamented' that the information specified in this section (2 R. S., p. 406, s. 73) was not privileged. Mr. Phillips expressed the same sentiments in his treatise on Evidence, p. 104. The ground on which communications to *counsel* are privileged is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will in most cases furnish a temptation to

THE RULE IN THE UNITED STATES CONCERNING EVIDENCE OF COMMUNICATIONS BETWEEN PATIENTS AND PHYSICIANS.

It is to be assumed, in the absence of statutes varying the rule, and of decisions to the contrary, in the several States of the United States, that in those States which derived their law from England the same rule of evidence obtains as that above enunciated. But many of the legislatures have by statute extended the privilege of secrecy to communications between patients and their physicians, as well as to other specified confidential communications which it does not fall within the scope of this work to discuss.

States and Territories in which there are No Statutes Restricting Evidence of Communications to Physicians.— The following States and Territories have no statute restricting the nature of the disclosures which a physician may be compelled to make in a court of justice: Alabama, Connecticut,[1] Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana,[2] Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, and West Virginia.[3, 4]

the perversion or concealment of truth, too strong for human resistance. In every view that may be taken of the policy, justice or humanity of the rule as it exists, its relaxation seems highly expedient."

These or similar reasons have prevailed in many States and Territories to bring about a statutory restriction on disclosures.

The unexpected effect of adopting the rule of exclusion advocated by the revisers in New York is illustrated by the cases cited under the head, "The result of the legislation," *infra*, p. 169.

[1] See Stephens' Dig. Law Ev. with Beers' Conn. notes, p. 304 (1901).

[2] Const. of La., 1898, Art. 297, provides: "The General Assembly shall provide . . . protecting confidential communications made to medical men by their patients while under professional treatment and for the purpose of such treatment."

The general assembly has not, however (1903) passed any law in compliance with this provision.

[3] While the statement concerning West Virginia is true so far as it respects any statute restricting generally disclosures by physicians, there is a statute restricting in a special manner the disclosures of a physician where he is sued for causing a death by wrongful act, neglect or default. In such case the physician sued is empowered to give evidence, but it is limited to the medicine or treatment given to the deceased or the operation performed, but he cannot give evidence of any conversation had with the deceased. Laws W. Va., 1897, c. 44. Code W. Va., 1899, c. 130, s. 23, see *infra*, p. 113.

[4] The following cases show or tend to show that the English rule is in operation in Connecticut, Kentucky, Maine, Maryland, Massachusetts, New Jersey, South Carolina, Tennessee, Texas, Vermont, and West Virginia: Wilson *v.* Town of Gran-

States and Territories in which there are Restrictive Statutes.—The following States and Territories have statutes restricting disclosures by physicians: Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Indiana, Indian Territory, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, Wisconsin, and Wyoming.[1]

by, 47 Conn., 59; Omberg *v.* U. S. Mut. Acc. Assn., 101 Ky., 303; Fayette *v.* Chesterville, 77 Me., 28; Hall *v.* Perry, 87 Me., 569; Weems *v.* Weems, 19 Md., 334; Frush *v.* Green, 86 Md., 494; Morrissey *v.* Ingham, 111 Mass., 63; Barber *v.* Merriam, 11 Allen, 322; Castner *v.* Sliker, 4 Vr., 95; Sullivan *v.* Latimer, 38 S. C., 158; Horne *v.* McRae, 53 S. C., 51; Steagald *v.* State, 3 S. W. Rep., 771; Jones *v.* White, 11 Hum (Tenn.), 268; Gulf, Col. & Santa Fé Ry. Co. *v.* Brown, 16 Tex. Civ. App., 93; Wetherbee *v.* Wetherbee, 38 Vt., 454; Jarrett *v.* Jarrett, 11 W. Va., 584; State *v.* Hull, 45 W. Va., 767. For the common-law rule in the States where statutes are now in force, see People *v.* Lane, 101 Cal., 513; People *v.* West, 106 Cal., 89; Head Camp, Woodmen of the World *v.* Loeher (Col.), 68 Pac. R., 136; Springer *v.* Byram, 137 Ind., 15; Prader *v.* Accident Association, 95 Iowa, 149; Winters *v.* Winters, 102 Iowa, 53; State *v.* Grinnell (Iowa), 88 N. W. R., 342; Campau *v.* North, 39 Mich., 606; People *v.* De France, 104 Mich., 563; Territory *v.* Corbett, 3 Mont., 50; Pierson *v.* People, 79 N. Y., 424; Edington *v.* Ætna L. I. Co., 77 N. Y., 564; Buffalo Loan Tr. & S. D. Co. *v.* Knights Templar, etc., 126 N. Y., 450; Fuller *v.* Knights Pythias, 129 N. C., 318, 40 S. E. R., 65; Munz *v.* Salt Lake City R. R. Co. (Utah), 70 Pac. R., 852; Boyle *v.* N. W. M. R. Assn., 95 Wis., 312. In Alabama, though a physician's testimony is not generally privileged, it may be inadmissible when it relates to transactions with the deceased patient. See Davis *v.* Tarver, 65 Ala., 98.

[1] Carter's Ann. Codes, Alaska, 1900, s. 1,038, Act of Congress, June 6, 1900, U. S. Stat. at Large, Vol. 31, p. 321 *et seq.*; Rev. Stat. Arizona, 1901, s. 2,535; Sandels & Hill's Dig. Stat. Ark., 1894, s. 2,919 as amended Laws 1899, c. 31; Code Civ. Pro. Cal., s. 1,881 as amended Mar. 8, 1901; Mills' Ann. Stats. Col., 1891, secs. 4,824, 4,825; Code District of Columbia approved Mar. 3, 1901, s. 1,073; Ballou's Civil Laws Hawaiian Islands, 1897, s. 1,418, and Resolution of U. S. Congress No. 55 of 1898, continuing municipal legislation in Hawaii, 30 U. S. Stats. at Large, p. 750; Code Civ. Pro. Idaho, 1901, s. 4,406; Burns' Ind. Stat. 1901, s. 505; Horner's Ann. Stats. Ind., 1901, s. 497; Act of May 2d, 1890, U. S. Stats. at Large, c. 182, making the laws of evidence of Arkansas applicable to Indian Territory; Carter's Laws of Indian Territory, s. 1,977, see Act of Congress, Mar. 1, 1895, respecting Crim. Pro. in Indian Territory; Code Iowa, 1897, s. 4,608; Code Civ. Pro. Kan., s. 323; Gen. Stats. Kan., 1901, s. 4,771; Compiled Laws Mich., 1897, s. 10,181; Gen. Stats. Minn., 1894, s. 5,662; R. S. Mo., 1899, s. 4,659; Code Civ. Pro. Montana (1895), s. 3,163; Code of Civ. Pro. Neb., secs. 333, 334, Compiled Stats. Nebraska, 1901, s. 5,907, 5,908; Cutting's Compiled Stats. Nev., 1900, s. 3,479; Code Civ. Pro. N. Y., secs. 834, 836, as amended by Laws 1893, c. 295, 1899, c. 53; Laws of N. C., Act of 1885, c. 159, Jerome's N. C. Cr. C. and Dig. 1899, s. 497; Rev. Codes N. Dak., 1899, s. 5,703, 5,704; Bates' Ohio Stats., 1902, s. 5,241; Stats. of Okla., 1893, s. 4,213; Bellinger & Cotton's Codes and Stats., Ore., 1902, secs.

The Rule in Federal Courts.—In trials at common law in the courts of the United States, the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are regarded as rules of decision.[1] Section 858 of the Revised Statutes of the United States prescribes rules with reference to competency notwithstanding color and interest of witnesses, and in actions by or against executors, administrators, or guardians, and then provides that "in all other respects the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at *common law*, and in *equity* and *admiralty*." Accordingly it has been held by the Supreme Court of the United States that in an action in the Circuit Court of the United States for the Southern District of New York, on a policy of life insurance, the evidence of a physician, inadmissible under Section 834 of the New York Code of Civil Procedure, was properly excluded.[2] And the construction put upon the law by the highest Court of the State in application to a state of facts alleged to constitute a waiver has been accepted by a federal Court in that State as binding upon it.[3] But in criminal prosecutions in United States Courts, the privilege secured by State statute does not avail.[4] The Act of Congress establishing the restrictive law for the District of Columbia provides that in the Courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, con-

724, 725; Laws Penn., 1895, No. 117; Ann. South Dak. Stats., 1901, s. 6,544, 6,545; Rev. Stats. Utah, 1898, s. 3,414; Ballinger's Ann. Codes and Stats., Wash., 1897, s. 5,994; Wis. Stats. 1898, s. 4,075; R. S. Wyo., 1899, s. 3,682. For the chronological order and the date of the passage of the earlier of these laws, see note to Gartside *v.* Connecticut Mutual L. I. Co., 76 Mo., 446. Notes on the judicial interpretation of the New York statute will be found in 2 N. Y. Annotated Cases 77, 293; 28 Abbott's New Cases, 55; 7 N. Y. Criminal Reports, 295. A note on the statutes of the several States and their interpretation with respect to expert opinions as to sanity or insanity will be found in 30 L. R. A., 306 n.

[1] Rev. Stats. U. S., s. 721.

[2] Conn. Mut. Life Ins. Co. *v.* Union Trust Co., 112 U. S., 250. See also Dreier *v.* Continental L. I. Co., 24 Fed. Rep., 670; Adreveno *v.* Mutual Res. Fund L. I. Co., 34 Fed. Rep., 870; Mutual Ben. L. I. Co. *v.* Robison, 58 Fed. Rep., 723 (U. S. C. C. A., 8th Ct., 1893).

[3] Metropolitan St. Ry. Co. *v.* Jacobi, 112 Fed. R., 924 (U. S. C. C. A. 2d Cir., 1901).

[4] Logan *v.* United States, 144 U. S., 263; United States *v.* Reid, 12 How., 361.

fidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall have been obtained from the patient or from his family or from the person or persons in charge of him; but the Act does not apply to evidence in criminal cases where the accused is charged with causing the death of or inflicting injuries upon a human being and the disclosure shall be required in the interests of public justice.

The several territorial statutes apply to proceedings in the Courts of the United States in the territories respectively; these will be treated in their order in the subsequent parts of this article.

THE STATUTES OF THE SEVERAL STATES AND TERRITORIES RESTRICTING EVIDENCE OF DISCLOSURES TO PHYSICIANS.

As the effect of these statutes depends largely upon their language, the construction put upon the law in one State is chiefly serviceable in interpreting that of another State in those particulars where the two are similar.

Statutory Declarations of Policy.—A comparative view of the several laws shows that in the following States there are declarations of policy prefixed to the prohibition of disclosures, which show the reason of the enactment, namely: California, Colorado, Idaho, Minnesota, Montana, North Dakota, Oregon, South Dakota, and Utah.[1] The declaration is to the effect that there are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate, and that therefore the prohibition of the statute is adopted.[2]

Analysis of the Language of the Statutes.

The common purpose of the statutes is to restrict the rule compelling disclosures, so as to protect with the cloak of secrecy, communications with a physician in his professional capacity; but the limit to which the protection is extended differs in the various States and Territories. An analytic com-

[1] See references to the several statutes in note 1 on p. 95.

[2] But the public has no interest in suppression where the persons concerned do not desire suppression. Railroad *v.* Martin, 41 Mich., 671; Cramer *v.* Hurt, 154 Mo., 112, 55 S. W. R., 258.

parison of the statutes tends to show how far the interpretation of one is useful in construing another.

1. Nature of the Action.—In Alaska, California, Hawaii, Idaho, Minnesota, Montana, Oregon, Pennsylvania, South Dakota, Utah, and Washington the statutes apply only to testimony in *civil* actions ("or proceedings," in Alaska; "action, suit, or proceeding," in Oregon).[1] In California the restrictive rule does not apply in an action between a physician or surgeon and his patient in which the treatment of the patient by the physician or surgeon is in issue. And in an action under s. 376 or 377 a physician or surgeon is competent to testify as to the *cause of death* of the deceased.[2] In Indiana, North Dakota, and Oklahoma the provision is found in the Code of Civil Procedure. But in these two States and this Territory the rules of evidence in civil cases are made the rules for criminal procedure.[3] The restrictive statute in Kansas is part of the Code of Civil Procedure, but it seems to be extended to criminal procedure by a general provision in the Code of Criminal Procedure.[4] In Michigan the statute is found under the title "Of Proceedings in Civil Actions."[5] In Nebraska the restrictive statute is found in the Code of Civil Procedure. In Nevada, in an act to regulate proceedings in civil cases. In Ohio the statute is found in that division of the codified laws of the state entitled "Procedure in the Courts of Common Pleas and Superior Courts and in Circuit Courts on Appeal."[6] In

[1] See Freel *v.* Market St. Cable Ry. Co., 31 Pac. Rep., 730 (Supr. Ct., Cal.); s. c., 97 Cal., 40; People *v.* Lane, 101 Cal., 513 (1894); People *v.* West, 106 Cal., 89 (1895). In Idaho the rules of evidence in civil actions are applicable also to criminal actions except as otherwise provided in *this* Code. Idaho Penal Code, 1901, s. 5,457; see State *v.* McCoy, 15 Utah, 136 (1897), for indication that physician's testimony is not privileged in criminal causes; see *infra*, p. 107, title, Criminal Actions and Evidence of Crime in Civil Actions.

[2] Cal. Code Civ. Pro. s. 1881, as amend. March 8, 1901, to take effect July 1, 1901.

[3] Thornton's Indiana Statutes, 1897, s. 1,887; Horner's Ann. Stats. Ind., 1901, s. 1,796. Rev. Codes North Dak., 1899, s. 8,192; Stats. Oklahoma, 1893, s. 5,207.

[4] Gen'l. Stats. Kan., 1899, s 5,459, *cf.* s. 5,465.

[5] In a recent criminal prosecution it was invoked, in respect to a dentist, and the court held the statute inapplicable because a dentist was not a physician or surgeon. People *v.* De France, 104 Mich., 563 (1895).

[6] Under title "Criminal Procedure" it is provided that, except as otherwise provided, the provisions of the Code of Civil Procedure relative to compelling the testimony of witnesses and their examination shall extend to criminal cases, so far as in their nature applicable. Bates' Ann. Ohio Stats., 1902, s. 7,289.

Oregon it is found in the Code of Civil Procedure, but the Criminal Code adopts the law of evidence in civil actions except as otherwise provided.[1] In South Dakota the rules of evidence in civil causes are made the rules in criminal procedure.[2] In Washington it is provided by statute that no regular physicians or surgeons shall be protected from testifying in criminal prosecutions as to information received from any defendant by virtue of their profession and character.[3] In West Virginia the prohibition is limited to actions against a physician for causing death by wrongful act, negligence or default.[4] In Wisconsin the statute is found under the title: "Provisions common to actions and proceedings in all courts," but this title is in a PART of the statutes entitled "Courts and Judicial Officers and Actions and Proceedings in Civil Matters." In Wyoming the statute is placed in Division 3 of the Revised Statutes entitled "Courts of Justice and Civil Procedure." By a subsequent section respecting Criminal Procedure in District Court the rules of evidence in Civil Causes seem to be made applicable to prosecutions.[5] In the District of Columbia the restriction does not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure shall be required in the interests of public justice. The other statutes make no distinction between *civil* and *criminal* proceedings. The Hawaiian statute excepts cases where the sanity of the patient is the matter in dispute. In the Indian Territory, by virtue of the extension of the statutes of Arkansas regulating criminal procedure, to that Territory, it would seem that the privilege exists in criminal prosecutions.[6]

II. *Waiver of the Privilege.*—The active words are different in the several statutes, but they indicate a purpose to extend

[1] Bellinger & Cotton's Codes and Stats. Ore., 1902, s. 1,399.

[2] Ann. So. Dak. Stats., 1899, s. 8,651.

[3] Ballinger's Ann. Codes and Stats. Wash., 1897, s. 6,940.

[4] The restriction in West Virginia is merely a *proviso*, which excludes from a general prohibition of evidence of transactions with a decedent, the testimony of a physician sued for causing death, permits him to testify, and restricts the character of his testimony. Laws W. Va., 1897, c. 44; Code W. Va., 1899, c. 130, s. 23; see *supra*, p. 94, n. 3.

[5] Rev. Stats. Wyo., 1899, s. 5,350.

[6] See Act of Congress, Mar. 1, 1895, c. 145, s. 4; U. S. Stats. at Large, Vol. 28, p. 693; Carter's Indian Territory Stats., 1899, s. 1,487.

a privilege which may be insisted upon by the person entitled to it, except in North Carolina, whose law provides that the presiding judge of a superior court may compel a disclosure, if in his opinion the same is necessary to a proper administration of justice.[1]

Some of the statutes show clearly that it is the patient's privilege, and suffer the patient or his representatives to waive it, either expressly or by conduct which the law declares to amount to a waiver. Others are silent as to this particular.

In Arizona, California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wyoming it is expressly provided that the patient's consent is necessary before a disclosure will be permitted.[2] In Alaska the testimony is not to be given *against the objection* of the patient. In the District of Columbia the consent of the *person afflicted* or *his legal representatives* is required. In Iowa and Nebraska *the party in whose favor the prohibition is made* may waive the rights conferred.

In Colorado and Oklahoma,[3] if the patient offer himself or a physician and surgeon as a witness, and in Kansas,[3] North Dakota, Oregon, and South Dakota, if the patient (in Oregon, party to the action) offer himself as a witness, that is to be deemed a consent to the examination of the physician or surgeon on the same subject.

In Arizona, if a person offer himself as a witness and voluntarily testify with reference to such *communications*, that is deemed a consent to the examination of such *physician*.

In Nevada, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall require or give consent, and any physician or surgeon shall give testimony, then the defendant may call any other physicians or surgeons as witnesses without the consent of the patient or party suing or prosecuting.

[1] See Fuller *v.* Knights of Pythias, 129 N. C. 318, 40 S. E. R., 65.

[2] See *infra*, p. 117, as to person entitled to waive the privilege.

[3] This seems to be the proper construction of the Kansas and Oklahoma statutes, though what seem to be typographical errors in the published laws render it doubtful; the same error formerly existed in the Kansas statute as in the Oklahoma statute. An attempt has been made to correct it in the latest compilation.

In Ohio and Wyoming, if the patient voluntarily testify the physician may be compelled to testify on the same subject.

III. The Witness whose Knowledge is Privileged.—In Indiana, Ohio, and Wyoming the privileged witness is a *physician;* in the other States and Territories, the privilege extends to a *physician* or *surgeon.* In Arkansas a *trained nurse*, and in New York a *professional* or *registered nurse*, is now included.[1]

In Arizona, under Act 1899, c. 65, the privileged communication must have been made to a physician or surgeon *practising under the laws of the Territory* (the matter in italics was omitted from the Revision of 1901 of the Laws of Arizona); in Arkansas and Indian Territory to a person *authorized to practise* physic or surgery; in Pennsylvania to a *person authorized to practise* physics or surgery; in California, to a *licensed physician or surgeon;* in Montana, and Nevada, to a *licensed* physician or surgeon; in Colorado, to a physician or surgeon *duly authorized* to practise his profession *under the laws of the State;* in Michigan, New York, North Carolina, and Wisconsin, to a person *duly authorized* to practise physic or surgery; in Minnesota, Oregon, and Washington, to a *regular* physician or surgeon; in Iowa and Nebraska, to a *practising* physician or surgeon; in the remaining States and Territories, these statutes do not in terms distinguish between licensed and unlicensed practitioners.[2] (See p. 680.)

In Michigan a law of 1897 provides for the secret marriage of persons where sufficient reason exists for keeping the date of the marriage secret to protect the good name of the female and the reputation of her family. In such a case a *family physician* of one or both of the parties was required to indorse the application for license, and his knowledge of the facts is declared a privileged communication.[3] But the statute was so amended in 1899 as to strike out these provisions concerning a physician.[4]

[1] Arkansas Laws, 1899, c. 31, amending Sandels & Hill's Digest, s. 2,919.

New York Laws, 1904, c. 331, amending s. 834, Code Civ. Pro.

[2] For laws regulating practice in the several States and Territories, see *infra*, p. 177 *et seq.* Statutes governing the testimony of persons whose profession is not generally regarded as falling within the descriptive term "physician or surgeon" are scarcely within the purview of this article; *e.g.*, the testimony of *veterinary surgeons* is regulated by Laws of Wisconsin, 1899, c. 82.

[3] Mich. Laws, 1897, c. 180.

[4] Mich. Laws, 1899, c. 231.

In New York, by the amendments of 1893 and 1904 to Sec. 836 of the Code of Civil Procedure it is provided that in an action for the recovery of damages for a personal injury the testimony of a physician or surgeon, or professional or registered nurse, attached to any hospital, dispensary, or other charitable institution, as to information which he acquired in attending a patient in a professional capacity in such institution, shall be taken before a referee. It does not appear whether this amendment is intended to take away the privilege, or merely to regulate the manner of taking such testimony when it is otherwise admissible.[1]

IV. The Privileged Matter.—The character of the communications which are privileged differs under the several statutes. In Alaska, Arkansas, California, Colorado, Idaho, Indian Territory, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wisconsin, they are characterized as *information;* in the District of Columbia, as *information confidential in its nature;* in Indiana, as *matter communicated;* in Iowa and Nebraska, as *confidential communications;* in Kansas, Ohio, Oklahoma, and Wyoming, as *a* or *any communication;* in Iowa and Nebraska, it is further provided that they be *properly intrusted;* and in Kansas and Oklahoma, that they be with reference to a *physical* or *supposed physical disease.* In Arizona the privileged matter is "*any communication* made by his patient with reference to any *physical or supposed physical disease,* or any *knowledge* obtained by *personal examination* of such patient."

In Kansas and Oklahoma, any knowledge obtained by a *personal examination* of a patient is also expressly privileged.

In Indiana, Ohio, and Wyoming, *advice* given by the physician is covered by the protection.

In Arkansas, Indian Territory, and Missouri, the privilege is limited to information acquired *from the patient;* and in Indiana, Kansas, Oklahoma, and Wyoming, to communications made *by the patient;* in the District of Columbia,

[1] Laws N. Y., Act 1893, c. 295. See note discussing probable effect of this amendment, 30 Abbott's New Cases, 84. Laws N. Y., 1904, c. 331. But he may be ordered to attend and be examined at the trial. *Ib.* For the judicial interpretation of the statutes in respect to the witness, see *infra*, p. 114.

whether obtained *from the patient or his family or the person in charge of him.*

The statutes of Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Indian Territory, Iowa, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wisconsin expressly limit the protection to matter acquired while attending in a *professional capacity*, or *professional character*, or *while attending the patient, or in attending the patient* or *properly intrusted to him in his professional capacity*, some statutes using one of these phrases, some another. In Wyoming the communication must have been made to the physician *in that relation;* and all of these statutes, as well as those of Arizona, either confine the privilege to *information necessary to enable the witness to prescribe or act for the patient;* or, to *information necessary to enable him to act in that capacity.*

In California the privilege does not apply in an action between a physician or surgeon and his patient in which the treatment of the patient by the physician or surgeon is in issue; and in certain actions (those brought under sec. 376 or 377 Code Civ. Pro.) a physician or surgeon is competent to testify as to the cause of the death of the deceased.

In Indiana the matter must have been communicated to the physician *as such, in the course of professional business.*

In Iowa and Nebraska the communication must have been *necessary and proper to enable the physician or surgeon to discharge the functions of his office according to the usual course of practice or discipline.*

In Michigan the statute providing for secret marriages, already adverted to,[1] declared *all knowledge of any facts* which shall come to the physician to be privileged communications. The amendment of this statute, by leaving out all reference to privileged communications, probably leaves the subject of privileged communications to physicians controlled by the general statute on that subject.[2]

In Pennsylvania the privileged information is limited to that "*which shall tend to blacken the character of the patient.*"

[1] *Supra*, p. 101, n. 3.
[2] Compiled Laws, Mich., 1897, s. 10,181.

In New York it is provided that "a physician or surgeon, or a professional or registered nurse, may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section eight hundred and thirty-four have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow, or any heir at law, or any of the next of kin of such deceased, or any other party in interest."[1]

The notable characteristics of the several statutes, which thus far have been pointed out, are discernible in the express language of the acts. It is to be borne in mind that the privilege is of statutory origin; that the statutes are often dissimilar; and that the value of a judicial interpretation of one law in the construction of another depends largely upon the likeness of the two statutes.

Judicial Interpretation of the Statutes.

The judicial decisions which are discussed here are those that deal with the privilege secured by the restrictive laws. The analogy between the privilege of a client with regard to his attorney's disclosures, and that of a patient with regard to the testimony of his physician, is not so complete as to make it essential to present here, for the sake of their bearing upon the subject now under consideration, a statement of the principles to be deduced from the numerous decisions with reference to attorneys as witnesses. The analogous cases of clergymen and priests are also beyond the scope of this treatment.

Rules of Construction.—The restrictions are in derogation of the common law[2] and, in accordance with the rule of interpretation ordinarily adopted, should be strictly construed,[3] but

[1] N. Y. Code Civ. Pro., s. 836, as amended Act 1893, c. 295, and Act 1904, c. 331. A similar exception was introduced by Act 1891, c. 381, and modified by Act 1892, c. 514. Prior to these amendments the law was interpreted to prohibit the introduction of communications between patient and physician in these cases. See *infra*, p. 110, also p. 698.

[2] *Supra*, p. 91, note 3.

[3] Bishop, Written Laws, secs. 119, 155; Potter's Dwarris, Statutes, p. 185; 1 Bouvier's Law Dictionary, "Construction," p. 386.

the courts have generally looked at the policy of the enactments, and have construed them so as to preserve inviolably the confidence existing between physician and patient, without narrowing their effect to a strict interpretation of their language.[1]

In Indiana, under a former law which protected matters *confided*, it was said that the statute should be given a broader scope than the word *confided* in a strict sense imports, so as to cover matters learned by observation and examination.[2] But it has also been said that it should not be extended beyond its evident letter and spirit.[3] So also, though the statute renders the *physician* incompetent, it has been held that the *patient* cannot be compelled to disclose the privileged matter.[4] And though the statute in terms absolutely prohibits a disclosure, it has been said, in Indiana, that it gives no right to the physician to refuse to testify where the patient waives the privilege,[5] and that it creates no absolute incompetency, because to hold otherwise would result in obstructing justice without subserving the purpose of the statute.[6] In Missouri, there is a dictum that the privilege should be carefully limited to what the statute requires, not so much because it is in derogation of the common law as because it is in exclusion of the best evidence, on the ground of privilege;[7] but in this very case, the real question was whether the word *oral* should be construed into the statute so as to exclude from its protection information acquired by inspection and observation, and it was held that no such narrow interpretation was proper. In a later case the narrowing dicta of the foregoing opinion were disapproved,[8] and subsequently the disposition to make a liberal construction was shown by the highest court of the State, although a general rule

[1] *E.g.*, McCormick *v.* United Life Assn., 79 Hun, 340 (N. Y., 1894), where the spirit of the statute was said to preclude evidence that the physician was a specialist in the treatment of cancer, and had treated the patient professionally, because it suggested the inference that the treatment was for cancer, though the physician gave no other indication of the communication between his patient and himself; Lowenthal *v.* Leonard, 20 App. Div., 330 (N. Y., 1897), where an order allowing extracts from a physician's books was disapproved.

[2] Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind., 203. For the construction of particular words and phrases, see *infra*, p. 136 *et seq.*

[3] Bower *v.* Bower, 142 Ind., 194 (1895).

[4] Post *v.* State *ex rel.* Hill, 14 Ind. App., 452.

[5] For waiver of the privilege, see *infra*, p. 117.

[6] Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92.

[7] Linz *v.* Mass. Mut. L. I. Co., 8 Mo. App., 363.

[8] Kling *v.* City of Kansas, 27 Mo. App., 231.

of interpretation was not announced.[1] In New York, the rule that a statute in derogation of the common law is strictly construed does not apply to the Code of Civil Procedure.[2] But before the enactment of this statutory rule[3] there was a tendency to interpret liberally the law prohibiting disclosures.[4] In Arkansas the tendency seems to be to construe the law strictly.[5] The spirit of interpretation will be more fully illustrated in the discussion of particular cases which follows.

In New York it was claimed that the protection afforded by the statute is nullified by the provision for the examination of a party before trial,[6] but it was held that the statutes are consistent and the physician cannot be made to disclose on such an examination, though his patient may be.[7] And, where a statute provided for physicians filing certificates of the cause of death of their patients in a public office, and another statute made all records of that department presumptive evidence of their contents, and made them receivable in evidence in any Courts of the State in any controversy between any parties, it was nevertheless held not to be the legislative intent to make death

[1] Gartside *v.* Conn. Mut. L. I. Co., 76 Mo., 446; said to be overruled by Groll *v.* Tower, 85 Mo., 249, in Squires *v.* City of Chillicothe, 89 Mo., 226; but followed in Thompson *v.* Ish, 99 Mo., 160.

[2] N. Y. Code Civ. Pro., s. 3,345. Disclosures by physicians are restricted by secs. 834, 836 of said Code.

[3] Code Civ. Pro., secs. 834, 836, as now existing are re-enactments with modifications of 2 R. S., p. 406, s. 73.

[4] People *v.* Stout, 3 Park Cr. Rep., 670; Edington *v.* Mut. L. I. Co., 67 N. Y., 185. Cf. Kendall *v.* Grey, 2 Hilt., 300; Pearsall *v.* Elmer, 5 Redf., 181. A disposition to construe the statute strictly was disclosed in the opinion of Earl, J., in Edington *v.* Ætna L. I. Co., 77 N. Y., 564, but his personal views were disapproved in subsequent cases; see Grattan *v.* Metro. L. I. Co., 80 N. Y., 281; Renihan *v.* Dennin, 103 N. Y., 573; Buffalo Loan, etc., Co. *v.* Knights Templar, etc., 126 N. Y., 450. See also Jones *v.* Brooklyn, etc., Ry. Co., 3 N. Y. Supp., 253; in matter of Darragh, 52 Hun, 591; Marx *v.* Manhattan Ry. Co., 56 Hun, 575; Treanor *v.* Manhattan Ry. Co., 28 Abb. N. C., 47. Corey *v.* Bolton, 31 Misc., 138.

[5] See Collins *v.* Mack, 31 Ark., 684.

[6] N. Y. Code of Pro., s. 390; N. Y. Code of Civ. Pro., s. 870.

[7] Edington *v.* Mut. L. I. Co., 5 Hun, 1; s. c., 67 N. Y., 185.

Under sec. 873, Code Civ. Pro., as amended by Law 1893, c. 721, and Law 1894, c. 429, the plaintiff in an action for personal injuries may be compelled to submit to a physician's inspection. Lyon *v.* Manhattan Ry. Co., 142 N. Y., 298 (1894). A similar statute exists in New Jersey (which has no statute prohibiting disclosures by physicians). Law of N. J., May 12th, 1896; McGovern *v.* Hope, 42 Atl. Rep., 830 (1899). The right of a Court to compel such inspection and disclosure independent of statute is discussed and the authorities reviewed in O'Brien *v.* City of La Crosse, 99 Wis., 421 (1898). The Supreme Court of the United States has held that such power does not exist independent of statute. Union Pac. Ry. *v.* Bots-

certificates furnished by physicians competent as evidence in actions between private parties.[1] In Wisconsin the statute provides that the physician shall not be *compelled* to testify (differing in that respect from most of the other similar statutes, which provide that he shall not be *allowed* to testify); but the Supreme Court of that State has interpreted this to mean that the physician can neither be compelled nor allowed to disclose the privileged testimony without the consent of his patient, stating that this interpretation gives the law the beneficial effect it was evidently designed to have, while by the literal meaning of its language it would be rendered of little or no practical effect.[2] In a later case it is said that the tendency of all courts has been and should be toward liberal construction to effectuate the purpose of the statute.[3]

Classes of Actions in which the Restrictive Rule is Enforced.

Criminal Actions and Evidence of Crime in Civil Actions.—The statutes confining the restriction to civil actions have been cited above.[4] In Indiana a physician employed by a person charged with the crime of abortion, to attend his victim, has been suffered to disclose what he discovered, the Court, through JORDAN, C. J., saying the rule declared by the statute is intended to protect the patient and not to shield one who is charged with perpetrating an unlawful act upon the patient.[5] In Iowa, it was said that the privilege does not extend to the protection of advice for the commission of a crime.[6] In New

ford, 141 U. S., 250; Camden & Sub. Ry. Co. *v.* Stetson, 177 U. S., 172 (1900). Cf. Page *v.* Page, 51 Mich., 88.

[1] Robinson *v.* Supr. Com. U. O. Golden Cross, 38 Misc. 97, affd., 77 App. Div. (N. Y.) 215, 79 N. Y. Supp., 13 (1902). See also Davis *v.* Supreme Lodge Knights of Honor, 165 N. Y., 159, Beglin *v.* Metrop. L. I. Co., 173 N. Y., 374, Sovereign Camp of Woodmen *v.* Grandon (Neb.), 89 N. W. Rep., 448.

[2] Boyle *v.* N. W. Mut. Rel. Assn., 95 Wis., 312 (1897); see also will of Bruendl, 102 Wis., 45. For an indication of the limit upon liberality of construction see *infra*, p. 115.

[3] Will of Bruendl, 102 Wis., 45 (1899); see this case for illustrations of the liberal interpretation of the words "necessary" and "prescribe."

[4] *Supra*, p. 98.

[5] Hauk *v.* State, 148 Ind., 238 (1897).

[6] Guptill *v.* Verback, 58 Iowa, 98. In this case, however, it was determined that it did not appear that a crime was intended. State *v.* Smith, 99 Iowa, 26 (1896). In this case the crime of abortion was contemplated.

York the restrictive rule was at first embodied in the Revised Statutes of the State,[1] but upon the adoption of the Code of *Civil* Procedure it was included therein,[2] and subsequently the provision of the Revised Statutes was repealed.[3] In that State by law the rules of evidence in civil cases are applicable also to criminal cases, except as otherwise expressly provided;[4] and the statutes provide no different rule in criminal actions as to this class of evidence. Notwithstanding this fact, however, it has been said by the Court of Appeals, in a case where there was an attempt to screen a murderer by insisting that his victim's physician was not a competent witness as to information acquired by him while attending his patient,[5] that the design of the law was to enable the patient to make known his condition to his physician without the danger of disclosing what would annoy his feelings, damage his character, or impair his standing while living, or disgrace his memory when dead, but that it was not intended to protect a murderer rather than to shield his victim; and quoting from the opinion of Talcott, J., in the court below,[6] the Court said: "The purpose for which the aid of the statute is invoked is so utterly foreign to the purpose and object of the act and so diametrically opposed to any intent which the legislature can be supposed to have had in enacting it, so contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder; that in such a case the statute is not to be so construed as to be used as a weapon of defence to a party so charged instead of a protection to his victim." Accordingly it was held that the evidence was not to be excluded under the statute. But the rule of exclusion is still ordinarily applicable to criminal actions. In a later case, where the accused was indicted for abortion, the same court held, that where the patient was living and the disclosure tended to convict her too of crime or to cast discredit and disgrace upon her, the evidence of her physician as to information acquired by him in attendance upon her was inadmissible in the trial of the man

[1] 2 R. S., 406, s. 73.
[2] Act 1876, c. 448, Code Civ. Pro., secs. 834, 836.
[3] Act 1877, c. 417, s. 1.
[4] 3 R. S., 1,029, s. 19. Superseded by Code Crim. Pro., s. 392, as amended by Act 1892, c. 279, s. 7. People *v.* Murphy, 101 N. Y., 126; People *v.* Brower, 53 Hun, 217.
[5] Pierson *v.* People, 79 N. Y., 424; People *v.* Harris, 136 N. Y., 423.
[6] Pierson *v.* People, 18 Hun, 239.

charged with the crime.[1] In a still later case,[2] the General Term of the Supreme Court held, where the accused was on trial for murder and he had confided to a physician what he had done, that the physician could not disclose the confidence. The rule deducible from these decisions seems to be that in New York the privilege extends to criminal actions, even though they be trials for murder, and even though the person accused be the patient, but that the statute will be applied only for the protection of the patient, and that where it is apparent that no injury can possibly be done to the patient or his memory by the admission of the evidence, and the interests of justice demand the disclosure, for the punishment of a person for an injury done to the patient involving a violation of the criminal law, and the patient is not alive to waive the privilege, the disclosure is not forbidden and will be compelled. But recently, in New York, the testimony of a physician to show that his patient was a morphine eater was admitted against objection on the trial of a person accused of murdering the patient. The Court said that declarations of the patient to the physician are no less admissible when they tend to disprove the crime of murder than when they tend to prove it. It accordingly, on a motion for a new trial on the ground of this newly discovered evidence, considered the evidence which the physician could give of what his deceased patient had said to him tending to her disgrace but also tending to explain facts which, except for such explanation, would tend to prove that her husband had killed her.[3] In Hewitt *v.* Prime, 21 Wend., 77 N. Y. (1839), in an action for seduction the testimony of a physician that he was asked for medicine to produce an abortion was admitted. It was stated that such testimony is not privileged, but there were other reasons for the judgment, and the case seems to be at variance with later decisions on that principle.[4]

In Indiana, information as to abortion and criminal intimacy is protected in an action for criminal conversation.[5]

[1] People *v.* Murphy, 101 N. Y., 126 (1886).

[2] People *v.* Brower, 53 Hun, 217 (1889). See also People *v.* Stout, 3 Park Cr. Rep., 670.

[3] People *v.* Benham, 30 Misc., 466 (Special Term Erie Co., 1900).

[4] See also Briggs *v.* Briggs, 20 Michigan, 34.

[5] Harris *v.* Rupel, 14 Ind., 209, but in a dissenting opinion in Citizens St. Ry. Co. *v.* Shepherd (Ind. App., 1902), 65 N. E. R. 765, it was said that where the answer would show

In Iowa it was said that a statute intended as a protection to a patient should not operate as a shield for one who is charged with murder; that while technically correct, such a construction is foreign to the purpose and object of the act and subversive of public justice and ought not to be adopted;[1] that the safety of the public is the supreme law and the legislature did not intend a prohibitive statute to operate as a barrier to the enforcement of the criminal laws, and that in a criminal case the prohibition is not absolute.

Divorce Causes.—In New York efforts have been made to exclude from the operation of the statute other classes of actions, to which it has been urged that the reasons for the enactment do not apply, or in which the mischief alleged to be wrought by its enforcement has been suggested as ground for believing that the legislature could not have intended to include them. Of these, actions for divorce on the ground of adultery are one class; but it has been held that they constitute no exception.[2]

Testamentary Causes.—In New York it was long supposed that the policy of the law excepted probate proceedings; it was so held by the Surrogate of New York City;[3] and also by the General Term of the Supreme Court,[4] by which it was stated that the practice had prevailed for a half-century in will cases,[5] but the Court of Appeals[6] has decided that testamentary cases constitute no exception to the rule, the judge who delivered the opinion stating that there is no more reason for allowing secret ailments of a patient to be brought to light in a contest over his

an intent to commit a crime or a fraud, that is not within the purpose of the act and is not privileged; and in Seifert *v.* State, 67 N. E. R. 100 (Ind., 1903), the statements of a patient to her physician that a man by whom she was pregnant had advised her not to commit abortion were admitted to contradict her dying declarations to the contrary.

[1] State *v.* Grinnell, 88 N. W. R., 342 (1901).

[2] Johnson *v.* Johnson, 4 Paige, 460; s. p. 14 Wend., 636; Hanford *v.* Hanford, 3 Edw. Ch., 468; Hunn *v.* Hunn, 1 T. & C., 499.

[3] Allen *v.* Pub. Adm., 1 Bradf., 221 (1850).

[4] Staunton *v.* Parker, 19 Hun, 55 (1879).

[5] Citing the fact that no objection was raised in the noted case of Delafield *v.* Parish, 25 N. Y., 1.

[6] Renihan *v.* Dennin, 103 N. Y., 573 (1886), followed in Loder *v.* Whelpley, 111 N. Y., 239 (1888); *In re* Hannah, 11 N. Y. St. Rep., 807 (Supr. Ct., G. T., 1887); In matter of Connor (Sup. Ct., G. T.), 27 N. Y. St. Rep., 905 (1889); Mason *v.* Williams (Sup. Ct., G. T., 1889), 6 N. Y. Supp., 479; Van Orman *v.* Van Orman (Sup. Ct., G. T., 1890), 34 N. Y. St. Rep., 824. See also In matter of Halsey (N. Y. Surr.), 29 N. Y. St. Rep., 533 (1890). Allen *v.* Pub. Adm., 1 Bradf., 221, had been overruled in part by Edington *v.* Mut. L. I. Co., 67 N. Y., 185 (1876), but not on this point.

will than in any other case, and that if mischief be wrought by the law the remedy lies with the legislature and not with the courts. The legislature has since afforded the remedy,[1] but not to the extent of adopting the rule of the earlier cases. In Indiana, in an action to set aside a will, the testimony of the testator's physician has been excluded.[2] In Iowa, in a dispute between the devisee or legal representative and the heirs-at-law of a deceased patient, the attending physician may be called as a witness by either party.[3] In another case in the same State it is indicated that it is the settled practice in the State to receive the testimony of the attending physician touching the testator's physical and mental condition at and prior to the execution of the will.[4] But in the case in question the evidence was justified on the ground of the executor's right to waive, rather than on the ground of the settled practice in testamentary causes. But in California, Michigan, Missouri, and Wisconsin it seems that testamentary cases are no exception to the general rule.[5]

Lunacy and Habitual Drunkenness.—In Hawaii the statute provides that there is no privilege where the sanity of the patient is the matter in dispute. It has been claimed in New York that inquisitions of lunacy are an exception, and it has been held that the alleged lunatic's physician may testify as to his mental condition because no one is better qualified to testify,[6] but this decision seems to be at variance with the principle of the decisions of the Court of Appeals with reference to testamentary cases, and presents no satisfactory reason for a distinction.[7] In a similar case in the Supreme Court, Chambers, it was held that a medical attendant at an asylum could not testify,[8] nor could a physician testify that his patient

[1] *Supra*, p. 103; *infra*, p. 121.

[2] Heuston *v.* Simpson, 115 Ind., 62.

[3] Winters *v.* Winters, 102 Iowa, 53 (1897).

[4] Denning *v.* Butcher, 91 Iowa, 425 (1894).

[5] *In re* Flint, 100 Cal., 391 (1893); Harrison *v.* Sutter St. Ry. Co., 116 Cal., 156 (1897); Fraser *v.* Jennison, 42 Mich., 206. In this case the testimony was admitted on the ground that the representative could waive the privilege. See Thompson *v.* Ish, 99 Mo., 160; Bryant *v.* Pierce, 95 Wis., 331.

[6] *In re* Benson (Monroe County Court), 16 N. Y. Supp., 111 (1891). Some States have statutory provisions for the qualification of physicians as examiners in lunacy, *e.g.*, Laws of Col., 1893, c. 119, s. 5; Laws of N. Y., 1874, c. 446, t. 1, art. 1, s. 1. The bearing of these provisions upon the statutory privilege has not been made clear.

[7] See Corey *v.* Bolton, 31 Misc., 138.

[8] In matter of Baird, 11 N. Y. State Rep., 263 (1887); *cf.* Martin *v.* Johnston, 1 Fost. & Fin. (Eng.), 122.

committed suicide while delirious.[1] It has also been held that a physician cannot make an affidavit as to the appearance and condition of his patient to support a petition for the appointment of a committee for him as an habitual drunkard.[2] But in Wisconsin an examination of a lunatic by a physician, not for the purpose of curing or helping her, but for the purpose of determining her mental capacity with a view to make application for her discharge from guardianship, was held not to be within the restrictive statute, because information so obtained was not necessary to enable the physician to prescribe for the lunatic.[3]

Fraud.—Still another class of actions in which contending principles have been invoked to make an exception in the law of privilege, is actions on life-insurance contracts. The contract of insurance is *uberrimæ fidei*, and the defence of fraud in the application is frequently interposed to defeat a claim under a policy. Medical testimony would often be the most satisfactory evidence to establish the fraud, and efforts have been made to introduce it under that excuse, but without avail. In the case of Dilleber *vs.* Home Life Insurance Company, in the Supreme Court of New York at General Term,[4] the question seems to have been directly before the court, and Davis, P. J., dissenting, insisted that the suppression of a physician's testimony ought not to be permitted so as to cover up a fraud, but the majority of the court held otherwise; the case was subsequently overruled, but not on the ground urged by Justice Davis.[5] The number of insurance cases in which the rule has been enforced seems to leave it beyond question that it will not be relaxed for the purpose of establishing fraud,[6] although that

[1] Beil *v.* Supreme Lodge, Knights of Honor, 80 App. Div. (N. Y.), 609, 80 N. Y. Supp., 751 (1903).

[2] In matter of Hoyt, 20 Abb. N. C. (Sup. Ct., G. T., 1887). See Pol. Code California, s. 2,212 *et seq.*, providing for examination of alleged insane person by physicians and a certificate by them as to their belief as to his mental condition.

[3] Will of Bruendl, 102 Wis., 45 (1899).

[4] 13 N. Y. W. D., 505 (1880).

[5] Dilleber *v.* Home L. I. Co., 13 N. Y. W. D., 505 (1881).

[6] The following cases in which the rule has been enforced have arisen out of contracts of life insurance: Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind., 203; Excelsior Mut. Aid Assn. *v.* Riddle, 91 Ind., 84; Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92; Ætna L. I. Co. *v.* Denning, 123 Ind., 390; Linz *v.* Mass. Mut. L. I. Co., 8 Mo. App., 363; Edington *v.* Mut. L. I. Co., 67 N. Y., 185; Grattan *v.* Metrop. L. I. Co., 80 N. Y., 281; s. p., 92 N. Y., 274; Conn. Mut. L. I. Co. *v.* Union Tr. Co., 112 U. S., 250.

announcement has not been specifically made. There seems no reason that the rule should be relaxed in that regard when it is not relaxed to establish the crime of the patient; though the mischief that may be done in such cases is apparent.[1]

West Virginia—Justice's Courts.—Although it has been said above (p. 96, n. 3) that in general there is no restrictive statute in West Virginia, there is a restrictive statute applicable to proceedings in *Justice's Courts.*[2]

The Patient.

It is the privilege of the patient and not of the physician.[3] In general the statutory protection is extended to *patients.* Attempts have been made, as indicated below, to introduce exceptions into the law by judicial construction.

Infants.—In New York it has been held that infants are patients within the protection of the rule of secrecy,[4] the Court saying that the makers of the statute did not contemplate by *patient* only persons who were capable of waiving in person, and that all persons regardless of disability are included in *patient*, and have the privilege of privacy and the right of waiver.

In Indiana a physician was not allowed to disclose the physical condition of a child born to his patient, but it does not appear whether the privilege was regarded as the privilege of the mother or of the offspring.[5]

Lunatics—Drunkards.—The cases on the privilege of persons under the disability of lunacy or drunkenness have been discussed above.[6]

Dead Persons.—In California it has been held that a dead

[1] See Renihan *v.* Dennin, 103 N. Y., 573, dictum to same effect.

See dissenting opinion Citizens St. Ry. Co. *v.* Shepherd, 65 N. E. R., 765 (Ind. App., 1902), where the judge expressed the view that the protection of fraud is not within the purpose of the law, and an answer showing an intent to commit a fraud is not privileged.

As to whether a physician may contradict his patient to prevent fraud, see *infra*, p. 125 *et seq.*

[2] Code W. Va., 1899, c. 50, s. 108. A physician or surgeon is incompetent to testify without his patient's consent concerning any communication made to him by his patient, which was necessary to enable him to prescribe and treat the case.

[3] Springer *v.* Byram, 137 Ind., 15.

[4] Corey *v.* Bolton, 31 Misc., 138 (App. Term. Supreme Ct., 1900); see State *v.* Depoister, 25 Pac. Rep., 1,000 (Nev.), s. c. 21 Nev., 107.

[5] Post *v.* State *ex rel.* Hill, 14 Ind. App., 452 (1895). See *infra*, p. 120, for waiver of infant's privilege.

[6] *Supra*, p. 111.

body is not a patient, and that a physician can disclose what appeared at an autopsy.[1]

The Witness.

The statutory provisions as to the professional status of the witness whose testimony is excluded have already been shown.[2] The facts which establish the relation of physician and patient will be treated later.[3] The witness is a member of a profession, but there is very little discussion in the cases as to what constitutes a physician or surgeon.[4] The language of the statutes as well as their policy and intent has been said to plainly embrace a physician who casually or in any way attends and prescribes for a patient, whether he be a family physician or the usual medical attendant or not.[5] The spirit of the acts would protect communications made to any person attending the patient in the accepted capacity of physician or surgeon wherever that might have happened, though the letter would confine it in some instances to duly authorized or duly licensed persons. Except in Colorado, it does not seem to have been established whether such authority or license must have been granted under the laws of the State where the trial is conducted, nor how the several statutes apply to communications made elsewhere, especially in States or countries where authority or license to practise is not required by law.[6] In Indiana, though the statute makes the physician incompetent, it has been held that the patient can himself object to testifying as to the privileged matter, and can object to the admission in evidence of previous admissions respecting the same;[7] and in Iowa, though the statutory rule does not expressly excuse the patient, it has been interpreted to excuse the patient from disclosing his communications with his physician.[8] In

[1] Harrison *v.* Sutter St. Ry. Co., 116 Cal., 156 (1897).

[2] *Supra*, p. 101.

[3] *Infra*, p. 146.

[4] "Physician: A person who has received the degree of doctor of medicine from an incorporated institution; one lawfully engaged in the practice of medicine."—Bouvier's Law Dict., vol. ii., p. 412.

"Surgeon: One who applies the principles of the healing art to external diseases or injuries, or to internal injuries or malformations, requiring manual or instrumental intervention. One who practises surgery."—Bouvier's Law Dict., vol. ii., p. 698, *q. v.*

[5] Edington *v.* Mutual L. I. Co., 5 Hun, 1.

[6] See *infra*, p. 116, n. 3.

[7] Post *v.* State *ex rel.* Hill, 14 Ind. App., 452; cf. Weinstein *v.* Reid, 25 Mo. App., 41.

[8] Burgess *v.* Simis Drug Co., 86 N. W. R. 307, 54 L. R. A. 364.

some States by statute and in others at common law the Court is empowered to compel a party to submit to a physical examination by physicians, to the end that they may disclose the results of their examination; it is not clear how far, if at all, the exercise of this power is curtailed by the statutes restricting the testimony of physicians.[1] In Indiana it has been held that *bystanders* may disclose what passed between the physician and patient.[2] But in the same case it was said *obiter* that such disclosures could not be made by persons whose intervention is strictly necessary to enable the physician and patient to communicate with each other. In the case mentioned the witnesses appear to have been in charge of an ambulance in which the patient lay while making his communication, but they were regarded by the Court as disinterested bystanders entitled to disclose, and not as persons whose intervention was necessary to the communication,[3] and the same rule was applied to a person who was not a physician, though he made his headquarters at the physician's office and gained his knowledge thereby.[4]

In Iowa it has been held that a veterinary surgeon is not the surgeon contemplated by the law, and that communications to him concerning a horse are not privileged.[5] In Michigan the term surgeon has been held not to include a dentist.[6] In Missouri it has been held that a drug and prescription clerk is not a privileged witness.[7] The question arose in the same State, whether a dental surgeon is forbidden to testify under the statute, but its determination was not essential to the judgment and it was left unanswered.[8] It has also been said that a bystander may disclose what the physician could not.[9]

[1] As an example of the statutes providing for the physical examination of a party, see N. Y. Code Civ. Pro., s. 873 as amd. Law, 1894, c. 429. For a discussion of the common law powers of courts in this respect and a review of the authorities see O'Brien *v.* City of La Crosse, 99 Wis., 421 (1898).

[2] Springer *v.* Byram, 137 Ind., 15 (1893).

[3] See the N. Y. decisions on similar ambulance cases, *infra*, p. 157, n. 6.

[4] Mason's Union Life Ins. Co. *v.* Brockman, 59 N. E. R., 401 (Ind. App., 1901).

[5] Hendershott *v.* Western Union Tel. Co., 106 Iowa, 529 (1898).

[6] People *v.* De France, 104 Mich., 563 (1895), 28 L. R. A., 139.

[7] Brown *v.* Hannibal & St. J. R. R. Co., 66 Mo., 588.

[8] Carrington *v.* St. Louis, 89 Mo., 208. But in State *v.* Fisher, 24 S. W. Rep., 167 (Supr. Ct. of Missouri, 1893), 22 L. R. A., 799, it was held by a vote of four to three that a dentist is not a physician within the meaning of the statute exempting a practitioner of medicine from jury duty.

[9] Bowles *v.* Kansas City, 51 Mo. App., 416 (1892).

It has been said with reference to the New York law that it is absolutely necessary that the witness should be a *duly qualified* physician;[1] and it has been held that the words "duly authorized" mean those persons who are not prohibited by the penal code from practising, so that an unlicensed physician may be compelled to disclose confidential communications.[2] Whether the same rule would be applied with reference to information obtained in another State by a physician duly authorized to practise there although prohibited from practising in New York, is a question that is suggested as being a case within the reason of the law but outside of its letter, and one which does not seem to have been answered.[3] A physician duly licensed, but not registered, has been held in New York to be "a person duly authorized to practise physic or surgery," within the purview of the restrictive statute.[4]

In New York, in an action by a physician for compensation for his services, it was held that a person who merely answered for a physician at his office in his absence, and was not himself a physician, is not a witness whose testimony is privileged.[5]

In Pennsylvania it has been said that no other person present and overhearing the information would be prevented from testifying.[6] To establish the privilege it is necessary that the person who insists upon it to exclude testimony should show by competent evidence that the witness belongs to the class privileged under the law.[7] In Pennsylvania the deposition of a physician, taken before the trial and before the passage of the restrictive law, was admitted at the trial after the law went into effect.[8] But where the physician testified that he was a regular practising physician and attended in that capacity, and

[1] People *v.* Stout, 3 Park Cr. Rep., 670 (1858). In this case the witness was undoubtedly a duly qualified physician under the State law.

[2] Wiel *v.* Cowles, 45 Hun, 307 (1887) (Supreme Ct., Gen. T.). Sec. 356, N. Y. Penal Code, which was in operation at that time, was repealed by Act 1887, c. 647, s. 9, but the prohibition of unauthorized practice is now to be found in Act 1893, c. 661, s. 140.

[3] But in Colorado the testimony of a New Jersey physician consulted in New Jersey was held not privileged, because he was not authorized to practise in Colorado. Head Camp Woodmen *v.* Loeher, 68 Pac. R., 136 (1902).

[4] McGillicuddy *v.* Farmers' L. & T. Co., 26 Misc., 55 (Supreme Ct., Trial term, 1899).

[5] Kendall *v.* Gray, 2 Hilt., 300 (N. Y. Com. Pl., Gen. T., 1859).

[6] Wells *v.* New England Mut. L. I. Co., 187 Pa. St., 166 (1898).

[7] *Infra*, p. 165.

[8] Wells *v.* New England Mut. L. I. Co., 187 Pa. St., 166 (1898).

he was not examined further as to his due authority, it was held that a failure to produce his license could not be urged on appeal as reason for compelling him to testify.[1] The Court said that if the privilege were the physician's he might, if the objection were taken, be required to prove by the best evidence that he was duly authorized, but as it is the patient's privilege, in the absence of objection to the sufficiency of the proof, the patient is entitled to the benefit of the presumption that the physician had the license which the law requires to entitle him to practise. The New York statute imposes the prohibition on "a person authorized to practise physic or surgery," but an order allowing extracts from a deceased physician's books was disapproved.[2]

Waiver of the Privilege.

Who may Waive.—Those States in which the law provides for a waiver have been enumerated;[3] in some others the courts have determined that the privilege of waiving is implied in the reason for the law.

Though the patient may waive, he is not, ordinarily, to be prejudiced by not waiving; it is therefore improper on cross-examination to ask him whether he is willing to waive.[4] It is said that a fair trial requires that the subject of waiver should not be referred to except at the instance of the party entitled to make it.[4] And the same rule applies after the death of the patient, to the person who has the power to waive, and his failure to waive or to call the privileged witness should not be commented on or taken into consideration by the jury.[5]

The Patient.—In Indiana it has been held that although the statute contains in terms an absolute prohibition, it creates no absolute incompetency and the privilege may be waived by the person for whose benefit it is made or his legal representative.[6] In Iowa the patient may waive.[4, 7] Under the Michigan law it was claimed that the physician is forbidden to reveal confidences even though he have his patient's consent,

[1] Record *v.* Village of Saratoga Springs, 46 Hun, 448 (N. Y. Supr. Ct., Gen. T.).

[2] Lowenthal *v.* Leonard, 20 App. Div., 330 (1897).

[3] *Supra*, p. 99.

[4] Burgess *v.* Simis Drug Co., 86 N. W. R. 307, 54 L. R. A. 364.

[5] Brackney *v.* Fogle, 156 Ind., 535 (1901).

[6] Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92; Morris *v.* Morris, 119 Ind., 341.

[7] State *v.* Grinnell, 88 N. W. R., 342.

but it has been held that the law only creates a privilege on the same footing with other privileged communications, which the public has no interest in suppressing when there is no desire for suppression on the part of the person concerned.[1] In Missouri, too, the patient may waive the privilege,[2] and in advance, as in an insurance contract, and no public policy precludes enforcing such waiver.[3]

The patient can disclose his own physical condition if he so desires.[4] The beneficiary of an insurance policy by furnishing a physician's certificate as proof of death, cannot waive the deceased patient's privilege.[5]

The physician cannot refuse to testify if the patient waives the privilege.[6]

The patient can waive the privilege during his life,[7] and his waiver is not against public policy.[8] And it seems that a patient can during his lifetime waive the privilege, the waiver to take effect after his death.[9] But the death of the patient does not alone remove the bar of secrecy.[10]

The New York law was amended in 1891 so as to require

[1] Grand Rapids & Ind. R. R. Co. *v.* Martin, 41 Mich., 667; Fraser *v.* Jennison, 42 Mich., 206. See Lincoln *v.* City of Detroit, 101 Mich., 245 (1894). See also *supra*, p. 97, n. 2; *infra*, p. 124.

[2] Carrington *v.* St. Louis, 89 Mo., 208; Squires *v.* City of Chillicothe, 89 Mo., 226; Blair *v.* C. & A. R. R. Co., 89 Mo., 334; s. p., 89 Mo., 383; Adreveno *v.* Mut. Res. F. L. I. Co., 34 Fed. Rep., 870; Davenport *v.* City of Hannibal, 18 S. W. Rep., 1122, s. c., 108 Mo., 471; Webb *v.* Met. St. Ry. Co., 89 Mo. App., 604.

[3] Keller *v.* Home L. I. Co., 95 Mo. App. 627, 69 S. W. R., 612 (1902).

[4] Mulhado *v.* Brooklyn City R. R. Co., 30 N. Y., 370; Heller *v.* Sharon Springs, 78 Hun, 344; Winner *v.* Lathrop, 67 Hun, 511; Shuman *v.* Supreme Lodge, Knights of Honor, (Iowa), 81 N. W. R., 717.

[5] Redmond *v.* Industrial Benefit Assn., 78 Hun, 104 (1894), affirmed 150 N. Y., 167.

[6] See Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92; Territory *v.* Corbett, 3 Mont., 50; Johnson *v.* Johnson, 14 Wend., 636; Babcock *v.* People, 15 Hun, 347.

[7] Barton *v.* Allbright, 29 Ind., 488; Campau *v.* North, 39 Mich., 606; Territory *v.* Corbett, 3 Mont., 50; Blair *v.* Chic. & Alton R. R. Co., 89 Mo., 334; Johnson *v.* Johnson, 14 Wend. (N. Y.), 636; Will of Bruendl, 102 Wis., 45 (1899).

[8] Holden *v.* Metropolitan L. I. Co., 11 App. Div. (N. Y.), 426 (1896); Foley *v.* Royal Arcanum, 151 N. Y., 196 (1896); Proppe *v.* Metropolitan L. I. Co., 13 Misc. (N. Y. C. P., 1895), 266; Dougherty *v.* Metropolitan L. I. Co., 87 Hun, 15 (1895); Keller *v.* Home L. I. Co., 95 Mo. App. 627, 69 S. W. R., 612. See also *supra*, p. 97, n. 2, *infra*, p. 124.

[9] See In matter of Freeman, 46 Hun, 548 (N. Y. Supr. Ct., G. T., 1887); Proppe *v.* Metropolitan Life Ins. Co., 13 Misc., 266 (N. Y. C. P., Gen'l Term, 1895).

See Adreveno *v.* Mut. Res. F. L. I. Co. (U. S. C. C. Mich.), 34 Fed. Rep., 870.

[10] Shuman v. Supreme Lodge, Knights of Honor (Iowa, 1900), 81 N. W. R., 717; *infra*, p. 121.

the waiver to be made upon the trial or examination, by the patient. It was held that this waiver upon the trial might be made by a stipulation signed before the trial and produced at the trial in the absence of the patient; and this stipulation might be in a written application for insurance[1] executed before the amendment in the law. But a commission to take the testimony of a physician before trial has been denied, on the ground that the Court will not anticipate that the testimony will be competent at the time of the trial.[2] This law has again been amended (N. Y. Laws, 1899, c. 53; 1904, c. 331) so as to require the waivers to be made in open Court on the trial of the action or proceeding, and a paper executed by a *party* prior to the trial, providing for such waiver, shall be insufficient for such waiver. But the attorneys for the respective parties may, prior to the trial, stipulate for such waiver. So strictly is this provision construed that it was held that it was no waiver under the terms of the statute for the physician with his patient's consent to have published a descriptive article of his patient's ailment and to have exhibited him at a public meeting of a society of physicians.[3]

None of the other statutes are in the exact terms of the New York statute, but those of California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, South Dakota, Utah, Washington, and Wyoming provide that the testimony shall not be given unless the *patient* consent; in Iowa the waiver provided for is that of the *person* in whose favor the prohibition is made; and in Nebraska, of the *party* in whose favor the provision is enacted. In Wisconsin it has been intimated that the patient may waive the privilege.[4]

Waiver by Persons Other than the Patient.—The protection vouchsafed by the law is designed for the benefit of the patient, and therefore the physician himself cannot waive it.[5]

[1] Dougherty *v.* Metropolitan L. I. Co., 87 Hun, 15 (1895); Holden *v.* Metropolitan L. I. Co., 11 App. Div., 426 (1896); Foley *v.* Royal Arcanum, 151 N. Y., 196 (1896), affirming s. c., 78 Hun, 222.

[2] Enright *v.* Brooklyn Heights R. R. Co., 26 App. Div., 538.

[3] Scher *v.* Metropolitan St. Ry. Co., 71 App. Div., 28.

[4] Boyle *v.* N. W. Mut. Rel. Assn., 95 Wis., 312 (1897); Kenyon *v.* City of Mondovi, 98 Wis., 50 (1897); Will of Bruendl, 102 Wis., 45 (1899).

[5] The most of the cases in which the rule has been enforced are those in which the physician has actually testified without raising the objection himself, and in which, therefore, the rule could not be enforced if the physician's waiver were valid, but the following cases particularly

Where the patient is an infant it has been held that his father, being natural guardian of his person, may waive the privilege, even though the guardian be a party to the action and interested in the disclosure, provided it does not appear that the disclosure is actually prejudicial to the infant patient's interest.[1] In Nevada it has been said that the parents of a seven-year-old infant may waive for the infant.[2] A husband has no power to waive for his wife.[3]

In a New York case it was held that an applicant for insurance could not, by a waiver of his own privilege, waive the privilege of members of his family respecting their ailments.[4]

are in point: Harris *v.* Rupel, 14 Ind., 209; Barton *v.* Allbright, 29 Ind., 488; Storrs *v.* Scougale, 48 Mich., 387; Linz *v.* Mass. Mut. L. I. Co., 8 Mo. App., 363; Johnson *v.* Johnson, 14 Wend., 636; Hanford *v.* Hanford, 3 Edw. Ch., 468; People *v.* Stout, 3 Park Cr. Rep., 670; Will of Bruendl, 102 Wis., 45.

[1] Corey *v.* Bolton, 31 Misc., 138. This case discusses the principles on which waiver is allowed, and contains a review of many cases; it expresses the view that the infant cannot himself waive because he is entitled to be protected against his own imprudence, that the right of waiver pertains to the person and not to the property, that the guardian of the person possesses the right in preference to the guardian of the property, but that the guardian should not be permitted to waive if prejudicial to the interests of the ward; that it need not affirmatively appear that the waiver is beneficial to the infant, and that to justify the court in interfering with the guardian's primary exercise of judgment, it must appear that there is reason to believe the ward will be prejudiced; that the guardian cannot by waiver prejudice his ward's subsequent assertion of the right, if it should appear that the prior waiver was to his prejudice; that an infant's waiver is not confined to a suit in which he is a party, nor to a case where his waiver is to his pecuniary advantage, that he is presumably interested in the disclosure of truth where the interests of justice demand it, that in the father's suit for loss of services by injury to his infant son, his interest did not disqualify him from waiving, and if it did the right devolved upon the mother, who being present in court and not objecting will be presumed to have acquiesced in the waiver; that what particular guardian waives is of no moment in a court of chancery powers, and after the allowance of the waiver no one should complain but the infant; that in cases of waiver on behalf of persons under disability, the court has the power to investigate of its own motion whether the incompetent's interests warrant waiver, though the arrest of the progress of the trial be necessitated (citing matter of Price, 67 N. Y., 235); and that the parents being natural guardians and guardians of the person can make waiver for an infant (citing also 39 Cent. L. J., 114 cases, of waiver by representatives, and Alberti *v.* N. Y., L. E. & W. R., 118 N. Y., 77, where the waiver was by attorney). Scott J. dissented on the ground that the privilege was purely personal and that the infant alone (being seventeen years of age) might have waived it; he expresses the view that a master could not waive for his servant; see State *v.* Depoister, 25 Pac. Rep., 1,000 (Nev.).

[2] State *v.* Depoister, 25 Pac. Rep., 1,000, s. c., 21 Nev., 107 (1891). See *supra*, p. 113.

[3] Cramer *v.* Hurt, 154 Mo., 112, 55 S. W. R., 258.

[4] Davis *v.* Supreme Lodge,

As it existed prior to 1891 the New York law provided that the prohibition should operate unless it was expressly waived by the patient.[1] This was interpreted to mean that the patient himself was the only person who could make a waiver; and that, therefore, the possibility of waiver ceased with the death of the patient, while the privilege of secrecy continued unabated, so that those claiming under the deceased patient could not waive the privilege, nor insist upon the testimony of the physician, even though their interests were in jeopardy on account of his silence.[2] The amendment of 1891 allowed an express waiver of information, except confidential communications and such facts as would tend to disgrace the memory of the patient, by his personal representatives, or if the validity of the last will and testament of the patient is in question, by the executor or executors named in said will (Law 1891, c. 381). "Personal Representatives" means only executors and administrators and not claimants under a policy of insurance.[3] The amendment of 1892 extended the privilege of waiver to the surviving husband, widow, heir at law, any of the next of kin or any other party in interest, in case the validity of the last will and testament of the patient is in question (Law 1892, c. 514). The present law contains the same provisions (Act 1893, c. 295; Act 1899, c. 53; Act 1904, c. 331).[4] Under the statute waiver by either the widow or the executors named in the will is sufficient.[5] The express waiver required by the statute may be given by the patient's attorney, because of the nature of the attorney's agency in conducting an action for the patient.[6]

In California the right of the heir of the patient to waive after the patient's death has been denied;[7] and more recently

Knights of Honor, 35 App. Div., 354 (1898).

[1] N. Y. Code Civ. Pro., s. 836 (Act 1876, c. 448), as amended Act 1877, c. 416, s. 185. Previous to the Code of Civil Procedure the provision for waiver was not in the statute, 2 R. S., 406, s. 73.

[2] Westover *v.* Ætna L. I. Co., 99 N. Y., 56; Loder *v.* Whelpley, 111 N. Y., 239; Alberti *v.* N. Y., L. E. & W. R. R. Co., 118 N. Y., 77. Staunton *v.* Parker, 19 Hun, 55, is thus overruled.

[3] Beil *v.* Supreme Lodge, Knights of Honor, 80 App. D. 609, 80 N. Y. Supp. 751 (1903).

[4] *In re* Murphy, 85 Hun, 575 (1895).

[5] *In re* Hopkins Will, 73 App. Div. (N. Y., 1902), 77 N. Y. Supp. 178, revd. 172 N. Y. 360 on another point.

[6] Alberti *v.* N. Y., L. E. & W. R. R. Co., 118 N. Y., 77.

[7] *In re* Flint, 100 Cal., 391 (1893).

the right of the personal representative of the patient to waive has also been denied.[1]

In Indiana, the privilege extends beyond the death of the patient, and it may be waived by the party who may be said to stand in the place of the deceased and whose interests may be affected by the disclosure.[2]

In Iowa, in a dispute between the devisee or legal representative and the heirs at law of a deceased patient, the attending physician may be called and the privilege of the patient may be waived by either party.[3] And generally in case of a will contest those representing the estate may waive whether they claim by devise, inheritance, or in a representative capacity.[4] But it is said that the Court may still exclude testimony tending to blacken the memory of a deceased patient, though the restriction be waived by his representatives.[5] And it has been held that the right to waive does not extend to persons, even though of the blood of decedent, claiming by appointment of a decedent made before his death, such as the beneficiaries of a policy of insurance claiming thereunder.[4]

In Michigan, what the patient may do in his lifetime, those who represent him after his death may also do for the protection of the interests which they claim under him.[6] In Missouri the representatives of the patient may waive;[7] and where the dispute is between devisees and heirs at law all claiming under a deceased patient, either the devisees or heirs may call the attending physician of the testator as a witness regarding information acquired by him in his professional attendance.[8] In Nebraska the wife of a decedent was regarded as "the party in whose favor the respective provisions are enacted."[9] In Wis-

[1] Harrison *v.* Sutter St. Ry. Co., 116 Cal., 156 (1897).

[2] Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind., 203.

[3] Deming *v.* Butcher, 91 Iowa, 425 (1894); Winters *v.* Winters 102, Iowa, 53 (1897). The case last cited criticises contrary decisions in other States.

[4] Shuman *v.* Supreme Lodge, Knights of Honor, 81 N. W. Rep., 717 (Supr. Ct. of Iowa, 1900); State *v.* Grinnell, 88 N. W. R., 342.

[5] Winters *v.* Winters, 102 Iowa, 53 (1897).

[6] Fraser *v.* Jennison, 42 Mich., 206.

[7] Groll *v.* Tower, 85 Mo., 249.

[8] Thompson *v.* Ish, 99 Mo., 160, distinguishes the New York statute from the Missouri statute; but seems to misinterpret Heuston *v.* Simpson, 115 Ind., 62, which does not hold that representatives cannot waive, but that they can invoke protection.

[9] Sovereign Camp of Woodmen *v.* Grandon, 89 N. W. R., 448.

consin it is intimated that the right of waiver is limited to the patient in his lifetime.[1]

Objections to the Admission of Privileged Communications; When and by Whom Made.—Having considered who can waive the privilege, it is material to discuss also the question who may insist upon the enforcement of the law. If the protection were only enforced on the claim of privilege by the patient, the very object of the statutes would be defeated in the large majority of instances because of the absence of the patient and every one interested in his behalf to assert his right. It rests, therefore, with any party to raise the objection and assert the prohibition. But it seems that the physician himself, unless a party, cannot make the objection.[2] It seems to have been thought in some of the cases that the right to insist upon the enforcement of the law is coupled with an interest derived from the patient. This idea started from the language used in the early cases enforcing the privilege at the instance of those claiming under deceased patients;[3] and it led to some confusion where the right of representatives to waive the privilege was denied; but it seems to be clear that the right to object differs from the right to waive, in that the latter is necessarily and logically dependent upon the relation between the patient and his representative, while the former is obviously suggested as the best method of enforcing the law. In Indiana it has been said that the statute gives to the representative of a deceased patient the right to object;[4] but that this is not by reason of the relationship appears from another case in the same State, where on an application for a new trial the Court voluntarily refused to grant one for newly discovered evidence disclosed to it by a physician's affidavit, on the ground that if the patient should object in the new trial the evidence would be excluded.[5] In

[1] Will of Bruendl, 102 Wis., 45 (1899).

[2] Johnson *v.* Johnson, 14 Wend., 636; Babcock *v.* People, 15 Hun, 347; Valensin *v.* Valensin, 14 Pac. Rep., 87 (Supr. Ct. Cal., 1887); s. c., 73 Cal., 106; cf. *In re* Hannah, 11 N. Y. St. Rep., 807, *infra*, p. 167. But see Loudoun *v.* 8th Ave. R. R., 16 App. Div. (N. Y.), 152.

[3] Penn. Mut. L. I. Co. *v.* Wiler, 100 Iud., 92; Allen *v.* Pub. Adm., 1 Bradf., 221; Edington *v.* Mut. L. I. Co., 67 N. Y., 185; see Westover *v.* Ætna L. I. Co., 99 N. Y., 56; Breisenmeister *v.* Supr. Lodge, etc., 45 N. W. Rep., 977 (Supr. Ct. Mich., 1890), s. c., 81 Mich., 325.

[4] Penn. Mut. L. I. Co. *v.* Wiler, 100 Ind., 92.

[5] Harris *v.* Rupel, 14 Ind., 209. See also Carthage T. Co. *v.* Andrews, 1 N. E. Rep., 364.

this State it has been held that the widow of the patient cannot object to the disclosure, if his administrator with the will annexed waives the privilege.[1] It has also been said that a person charged with a crime with respect to the patient cannot make the objection to shield himself.[2]

In Michigan, it has been said that the physician cannot avail himself of the statute for his own benefit; but that was in a case where the communication was not really of the privileged class.[3] In New York, in proceedings to which a physician was a party, an examination of his books of account before trial has been refused on the ground of privilege, and for the same reason a motion to direct a physician to turn his books of account over to a receiver has been denied.[4]

In Montana it has been said that when the patient consents no one else can object to the reception of the physician's testimony.[5]

In New York it has been said that the benefits of the law are to be dispensed alike to those familiar with and those ignorant of its existence and applicability, and it is therefore no reason to refuse its enforcement, that the patient did not know that his communication was privileged.[6]

But, as in other cases of the receipt of improper evidence, it would seem that the objection should be made at the time it is offered, and if the objection is not then made, it will not avail to raise it later or on appeal.[7] It should not be prematurely made.[8] But it is proper that it be ascertained who has put the physician forward as a witness, in order to determine whether the privilege is waived.[9] In New York where in pursuance of a special feature of practice in probate proceedings,[10] certain witnesses are regarded as the surrogate's witnesses though produced at the instance of the con-

[1] Morris *v.* Morris, 119 Ind., 341.
[2] Hauk *v.* State, 148 Ind., 238 (1897), see *supra*, p. 107.
[3] Scripps *v.* Foster, 41 Mich., 742.
[4] Mason *v.* Libbey, 2 Abb. N. C., 137; Mott *v.* Consumers' Ice Co., 2 Abb. N. C., 143.
[5] Territory *v.* Corbett, 3 Mont., 50.
[6] People *v.* Stout, 3 Park Cr. Rep., 670 (N. Y. Oy. and Ter., 1858).
[7] Johnson *v.* Johnson, 14 Wend., 636 (overruling s. c., 4 Paige, 460); Breisenmeister *v.* Supreme Lodge, etc., 45 N. W. Rep., 977 (Supr. Ct. Mich., 1890), s. c., 81 Mich., 525; Wheelock *v.* Godfrey, 100 Cal., 578; Lissak *v.* Crocker Est. Co., 119 Cal., 442 (1897). See also *infra*, p. 125.
[8] Valensin *v.* Valensin, 14 Pac. Rep., 87 (Supr. Ct. Cal., 1887), s. c., 73 Cal., 106.
[9] Tracey *v.* Metropolitan St. Ry. Co., 49 App. Div., 197 (1900).
[10] N. Y. Code Civ. Pro., s. 2,618.

testant, and the contestant, after giving notice that the evidence of physicians as such witnesses was material, refused to examine them, and the surrogate required the proponent to suggest a line of examination, it was held that it did not lie with the contestant to object to the physicians' testimony as privileged, because she had lost her right to object by giving notice that the evidence of those witnesses on these points was material.[1]

Objection cannot be raised in the progress of an examination after the forbidden testimony has been in part received without objection; for that would unjustly enable a party to open the door and get in all he desired and then to close it to the disadvantage of his adversary; when the door is once properly opened the examination may be continued until it is complete, despite the objection of the party at whose instance it was begun.[2]

In Indiana, where there was no objection, it was held that the evidence should not be withdrawn from the consideration of the jury or its weight diminished by comments on its value as a matter of law.[3]

The objection can be effectually made where the privileged matter is attempted to be used in an affidavit on a motion for a new trial,[4] or in the certificate of the physician furnished pursuant to laws respecting vital statistics.[5]

But when such evidence has already been admitted in the face of objection, it is not necessary for the party to object again, as nothing is waived by conforming with a rule already laid down.[6] Where it is apparent that no harm is done to the objecting party by an improper ruling on the receipt of privileged communications, no weight will be given to an exception to such ruling.[7]

What Constitutes a Waiver of the Privilege.—The statu-

[1] Hoyt *v.* Hoyt, 9 N. Y. St. Rep., 731 (N. Y. Supr. Ct., G. T.), affirmed 112 N. Y. 493. But it should be noted that now in New York the waiver must be made at the trial to be effective, *supra*, p. 119.

[2] Hoyt *v.* Hoyt, 9 N. Y. St. Rep., 731 (N. Y. Supr. Ct., G. T.); Wheelock *v.* Godfrey, 100 Cal., 578; Lissak *v.* Crocker Est. Co., 119 Cal., 442 (1897).

[3] Van Valkenburg *v.* Van Valkenburg, 90 Ind., 433.

[4] Noble *v.* Kansas City, 68 S. W. R., 969 (Mo. App., 1902).

[5] Robinson *v.* Supreme Commandery, 77 App. Div., 215, 79 N. Y. Supp., 13, see *supra*, p. 106.

[6] Dilleber *v.* Home L. I. Co., 69 N. Y., 256.

[7] Loder *v.* Whelpley, 111 N. Y.. 29.

tory provisions as to what constitutes a waiver have been set forth above.[1] And waiver by express stipulation has also been considered.[2] But the waiver need not be express; it may be implied from conduct.[3] The possible combinations of circumstances with which the courts may have to deal in determining whether or not they amount to a waiver, are, of course, unlimited in their variety. The decisions cited below merely serve to illustrate them; they are believed to be all of the reported cases on the subject of waiver up to the time of going to press. Those situations recurring with the greatest frequency are: a request to a physician to become subscribing witness to a will; a reference to a family physician or express waiver in an application for insurance; furnishing information in proofs of death to insurance companies; calling one physician as a witness when there have been others; the patient offering himself as a witness; suing the physician for malpractice; the proof in one trial of a waiver in another trial; the cross-examination of the physician when offered by another, and offering the physician as a witness as to anterior and subsequent communications. All of these situations and others are treated below in the order of the States in which the questions have arisen. It does not appear to have been determined that there may be a limited waiver or a waiver *ad hoc*, though in one California case there is an intimation, and from one New York case it might be inferred, that there might be.[4]

In California it has been said that cross-examination of the physician by the patient, calling for privileged matter, is a waiver of privilege.[5] Also, that requesting a physician to become a subscribing witness to a will is a waiver.[6] But where a physician wrote his patient's will, and read it to him, and held the pen while he signed his name, that was not a waiver and did not authorize the physician in a contest over the will to testify as to the mental capacity of his patient where

[1] *Supra*, 99.

[2] *Supra*, 119.

[3] Holcomb *v.* Harris, 166 N. Y., 257, and the cases following under this heading.

[4] *In re* Nelson's Est., 132 Cal., 182, 64 Pac. R., 294 (1901). This decision contains a discussion of the distinction between the situation of an attorney and that of a physician in like circumstances; the Court also intimates without deciding that there might be a limited waiver. Dunkle *v.* McAllister, 70 App. Div., 273 (1902).

[5] Valensin *v.* Valensin, 14 Pac. Rep., 87 (Supr. Ct. Cal., 1887), s. c., 73 Cal., 106.

[6] *In re* Mullin, 110 Cal., 252; see p. 132, n. 5 *infra*.

it involved information acquired from the patient and observation while in attendance upon him for the purpose of prescribing.[1] Also, suffering a physician to be examined as to privileged matter without objection, even though the objection is made later.[2] In Colorado the physician was suffered to testify against objection where the examination had been made under an order of court for the purpose of enabling the physician to testify as to the mental condition of the defendant and by agreement between the defendant, the alleged patient, and the prosecuting officer.[3] In Indiana it has been held that consent to disclosure cannot be inferred from the patient's simply giving the name of his family physician in applying for a policy of insurance on his life, and that a waiver in such an application should be evidenced by a stipulation too plain to be misunderstood.[4] And a physician's statements of the cause of his patient's death, furnished to an insurance company, in pursuance of a stipulation of a policy that satisfactory proof of death shall be submitted to the company, are not rendered admissible by that stipulation.[5] It has also been held that consent to the evidence of one physician is no consent that another physician may divulge confidential communications;[6] and that the physician cannot testify that he found no evidence of injury on the examination of his patient, in order to contradict her;[7] the patient had already testified as to her condition and what the physician had done, but not as to anything said to her by her physician; she had expressly declined to testify concerning communications except as to his prescription for her injury, and without asking him to disprove her assertions the trial court permitted him to say that he had found no evidence of injury; this was held to be error. Testimony of the patient as to the manner in which injury was received, the time when and the physicians who treated her, a denial that she made certain statements to them, testimony about her previous and subsequent condition, and the testimony of two other physicians, did not amount to a waiver of

[1] *Vide*, n. 4, p. 126.

[2] Lissak *v.* Crocker Est. Co., 119 Cal., 442 (1897).

[3] Nesbit *v.* People, 19 Col., 441 (1894).

[4] Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind., 203.

[5] Dreier *v.* Continental L. I. Co., 24 Fed. Rep. 670; cf. Breisenmeister *v.* Supr. Lodge, etc., 45 N. W. Rep., 977 (Supr. Ct. Mich., 1890), s. c., 81 Mich. 525.

[6] Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92, see note 1, p. 130.

[7] Williams *v.* Johnson, 112 Ind., 273.

her privilege as to whether another physician examined her, whether she stated her symptoms to him, whether she said nothing about that to her other physicians, and whether she had not denied certain aches and pains to her other physicians, and whether she had not stated to her physician that she had been advised by counsel to commit abortion.[1] It has also been held that the taking of a physician's deposition and filing it, for the purpose of breaking the force of his testimony in a deposition taken by the opposite party, is no consent in itself to the reading of the other party's deposition.[2] But when, in an action against a physician for malpractice, the patient testifies as to the manner of treatment, the physician is then at liberty to introduce the testimony of himself or another physician as to the facts thus put in issue by the patient.[3] In a later case of a similar nature it was held that the suit itself was a waiver as to all matters connected with the treatment in which the physician participated,[4] and that he may testify himself and call a consulting physician to testify as to matters connected with the treatment which the patient has not himself in his testimony gone into. It was said that it is not permissible for the patient to select certain portions of the treatment or certain visits and examinations, and by detailing them limit the physician's evidence to those particular occurrences.[5] But the rule that where the patient himself testifies, he waives the privilege, is, in Indiana, confined to actions in which the physician is defendant;[6] and even then does not include other physicians than the defendant whose treatment began after defendant's treatment ceased.[7] A physician who was present in his professional capacity at a time when the patient published his will, but who was not a witness to the will, cannot testify as to the patient's mental condition.[8]

[1] Citizens' St. Ry. Co. *v.* Shepherd, 65 N. E. R., 765 (Ind. App., 1902).

[2] Ætna L. I. Co. *v.* Denning, 123 Ind., 390.

[3] Lane *v.* Boicourt, 27 N. E. Rep., 1111, s. c., 128 Ind., 420.

[4] Citizens' St. Ry. Co. *v.* Shepherd, 65 N. E. R., 765 (Ind. App., 1902); see note 5.

[5] Beckneel *v.* Hosier, 10 Ind. App., 5 (1893). Cf. Citizens' St. Ry. *v.* Shepherd; cf. with suit by husband for malpractice in treating wife, *infra*, p. 130, n. 7.

[6] City of Warsaw *v.* Fisher, 55 N. E. R., 42 (Ind. App., 1899), disapproving Treanor *v.* Ry. Co., 16 N. Y. Supp., 536, to the contrary.

[7] Aspy *v.* Botkins, 66 N. E. R., 462 (Ind., 1903).

[8] Gurley *v.* Park, 135 Ind., 440 (1893). As to cases where the physician was a witness to his patient's

In Iowa it has been held that the testimony of a patient regarding the condition of his health is not a waiver of privilege, so as to allow his opponent to introduce the testimony of his physician to contradict him.[1] So, also, introducing the evidence of one physician is not the waiver of the privilege respecting another.[2] What amounts to a waiver is to be determined by the general rules of evidence previously applicable to communications between attorney and client. The patient may waive by failing to make objection when the testimony is offered, and also by his conduct, such as himself testifying as to the subject matter of such communications, but such testimony must be voluntarily given, and failure to insist on privilege on cross-examination does not amount to a waiver.[3] Waivers and admissions are to be distinguished, and a physician's affidavit to an insurance company may be admitted in evidence against the party who procured and furnished it, as such party's admission respecting the truth of its contents, though he could not waive the patient's privilege, and though the affidavit could not be offered as evidence of the physician or of what he said.[4]

In Michigan a physician has been allowed to contradict his patient as to the time when her trouble commenced, but on the ground that it had not been shown that the information was necessary to enable him to prescribe.[5] But it has been said that waiver as to one physician is not waiver as to another regarding a different time.[6] In the same case it was said it would have been different if a partial examination of the other physician had been gone into by the patient. In this State it has been said that the privilege having been waived in one trial, that is not a waiver in the second trial, differing in this respect from the interpretation put on the New York law.[7] It has been held that a notice by a patient to an adversary to produce a

will, see *In re* Mullin, 110 Cal., 252; *In re* Freeman, 46 Hun, 458; *infra*, p. 130, n. 5, *supra*, p. 126, n. 6.

[1] McConnell *v.* City of Osage, 45 N. W. Rep., 550, s. c. 80 Iowa, 293.

[2] Baxter *v.* City of Cedar Rapids, 103 Iowa, 599 (1897).

[3] Burgess *v.* Simis Drug Co. (Iowa, 1901), 86 N. W. R., 307, 54 L. R. A. 364, disapproving McKinney *v.* R. R. Co., 104 N. Y., 352.

[4] Nelson *v.* Nederland Life Ins. Co., 81 N. W. Rep., 807 (Supr. Ct. of Iowa, 1900).

[5] Campau *v.* North, 39 Mich., 606.

[6] Dotton *v.* Albion, 24 N. W. Rep., 786, s. c. 57 Mich., 575. See also Cooley *v.* Foltz, 85 Mich., 47 (1891).

[7] Breisenmeister *v.* Supreme Lodge Knights of Pythias, 81 Mich., 525 (1890). See N. Y. law, *infra*, p. 132, n. 3.

letter written by the physician is not a waiver of privilege.[1] A statement in an application for insurance that applicant has been treated for a particular disease by a physician does not waive the privilege so as to permit the examination of the physician as to whether he ever treated the patient for another disease.[2]

In Minnesota an applicant for insurance waived "all provisions of law forbidding any physician or surgeon who has attended him from disclosing any information which he thereby acquired." He suffered the policy to lapse and was subsequently reinstated, in consideration of which he renewed, reaffirmed, and warranted each of the statements in the original application. This was held not to amount to a waiver of information acquired by a physician subsequent to the date of the original application.[3]

In Missouri the patient's testimony as to the treatment by his physician waives the privilege as to that physician, who may then contradict the patient.[4] The calling of a physician by the patient as a witness to testify as to information acquired while attending, is a waiver.[5] But offering one physician as a witness is not a waiver of the privilege with reference to another.[6] Nor, in a suit against a physician by a husband for malpractice in treating his wife, is the husband's offer of his wife as a witness a waiver of the wife's privilege,[7] nor is the husband's bringing of the suit a waiver, nor an intimation that he has his wife's authority to waive. And it is no waiver for the patient to attempt to testify as to what the physician has said, when such testimony is ruled out as improper.[8] An applicant for insurance may, by an express waiver in his application, make an efficient waiver, binding upon any one claiming under the contract of insurance.[9] A patient hav-

[1] Phillips *v.* United States Ben. Soc., 79 N. W. Rep. (Supr. Ct. Mich., 1899).

[2] Jones *v.* Preferred Bankers L. A. Co., 79 N. W. Rep., 204 (Supr. Ct. Mich.).

[3] Geare *v.* U. S. Life Ins. Co., 66 Minn., 91 (1896).

[4] Webb *v.* Met. St. Ry. Co., 89 Mo. App., 604.

[5] Carrington *v.* St. Louis, 89 Mo., 208; Squires *v.* Chillicothe, 89 Mo., 226; Thompson *v.* Ish, 99 Mo., 160.

[6] Mellor *v.* Mo. Pac. Ry. Co., 14 S. W. Rep., 758; 16 S. W. Rep., 849, s. c. 105 Mo., 455. Webb *v.* Met. St. Ry. Co., 89 Mo. App., 604.

[7] Cramer *v.* Hurt, 154 Mo., 112, 55 S. W. R., 258 (1899).

[8] Smart *v.* Kansas City, 91 Mo. App., 586 (1901).

[9] Adreveno *v.* Mut. Res. F. L. I. Co., 34 Fed. Rep., 870.

ing testified that his physician examined him and found a bruise on his back, thereby opened the way for his physician to state what was the matter with him and what he stated to his physician.[1]

In Nebraska the waiver may be implied from the manner of cross-examining the physician when called by another to testify to the fact of attendance.[2] And it was said that where the party in whose favor the privilege is established, of his own volition, in any manner or form places before the jury the evidence of the physician [*with respect to the privileged matter?*], he waives.[2]

In Nevada a waiver has been implied from the testimony of the patient and her mother, where the patient was an infant seven years of age.[3] And it was said that the parents of such an infant may make the waiver.

In New York it is a waiver to call a physician as a witness and ask him to disclose privileged communications, and this is true of legal representatives when entitled to waive;[4] but it has been held that reference to a family physician, when answering questions on an application for insurance, is not a waiver;[5] nor is offering in evidence an application for insurance containing a waiver (where the law requires the waiver to be made at the trial);[6] nor is the presence of a third person, in aid of the patient;[7] nor is the bringing of an action for damages for an injury;[8] nor is the interposition of an answer containing a general denial in an action to recover for the physician's services;[9] nor the examination of the physician in a former trial

[1] Highfill *v.* Mo. Pac. Ry. Co., 93 Mo. App., 219 (1902).

[2] Sovereign Camp of Woodmen *v.* Grandon, 89 N. W. R., 448 (Neb.).

[3] State *v.* Depoister, 25 Pac. Rep., 1000, s. c. 21 Nev., 107 (1891); but see dissenting opinion of Bigelow, J.; see also McKinney *v.* Grand St. R. R. Co., 104 N. Y., 352. See *supra*, p. 120, for waiver of infant's privilege.

[4] Holcomb *v.* Harris, 166 N. Y., 257.

[5] Edington *v.* Mut. L. I. Co., 5 Hun, 1 (reversed in part by Edington *v.* Mut. L. I. Co., 67 N. Y., 185, but affirmed on this point); Robinson *v.* Supreme Commandery U. O. Golden Cross, 38 Misc., 97, affd. 77 App. Div., 215, 79 N. Y. Supp., 13; motion to dismiss appeal denied, 175 N. Y., 4.

[6] Meyer *v.* Supreme Lodge, Knights of Pythias, 81 N. Y. Supp., 813 (1903).

[7] Cahen *v.* Continental L. I. Co., 41 N. Y. Super., 296 (overruled on another point but affirmed on this in 69 N. Y., 300).

[8] Jones *v.* Brooklyn, B. & W. E. Ry. Co., 3 N. Y. Supp., 253; Butler *v.* Manhattan Ry., 30 Abb. N. C., 78 (N. Y. Super. Ct., Gen. T., 1893).

[9] Van Allen *v.* Gordon, 83 Hun, 379 (1894).

by the opposing party;[1] nor is the mere calling of the physician as a witness;[2] but where the ban of secrecy is once removed in an action and the information once lawfully made public, at the instance of the patient, it cannot be restored, and the disclosure may then be compelled in any subsequent action;[3] and a partial disclosure authorized by the patient entitles the opponent to a complete disclosure.[4] It would seem, too, that a physician who becomes a witness to his patient's last will and testament at the patient's request is then subject to a thorough examination on all points involving the patient's testamentary capacity.[5] It was formerly held that the waiver might be, by an agreement, in an application for insurance.[6] But since the amendment requiring the waiver to be at the trial, a waiver in an insurance application is ineffectual and the beneficiaries can not waive for the patient.[7]

Where the patient testified herself and called an attending physician to prove her physical condition, it was once said, this was not a consent to the examination of another attending physician, and it was said that the opposite party by tactics on

[1] Grattan *v.* Metrop. L. I. Co., 92 N. Y., 274.

[2] Holcomb *v.* Harris, 42 App. Div., 363 (1899).

[3] McKinney *v.* Grand St. R. R. Co., 104 N. Y., 352; see criticisms of this case in Breisenmeister *v.* Supr. Lodge, 45 N. W. Rep., 977 (Supr. Ct. of Mich., 1890), s. c. 81 Mich., 525; and in Burgess *v.* Simis Drug Co. (Iowa, 1901), 86 N. W. R., 307, 54 L. R. A., 364. See also Mason *v.* Libbey, 2 Abb. N. C., 137; see unanswered queries on similar points in People *v.* Schuyler, 106 N. Y., 298. Query: Whether this rule would apply now that waiver must be at the trial. See *supra*, pp. 118, 119.

[4] Lawson *v.* Morning Journal Association, 32 App. Div., 71.

[5] See *In re* Freeman, 46 Hun, 458, in which a will was admitted to probate on the concurrence of Learned, J., who held that the relation of physician and surgeon was not established, and Landon, J., who held that the request to sign constituted a waiver; Williams, J., dissenting, on the ground that the relation was established in the case, and the waiver could not be assumed without proof of the patient's mental capacity to comprehend the waiver; that it was not proper to assume testator's competency to waive in order to enable the witness to testify that the patient was competent to make a will. See *supra*, p. 126, n. 6.

On the analogous case of an attorney as witness to a will, see Matter of Coleman, 111 N. Y., 220; and N. Y. Code Civ. Pro., s. 836, as amended Act 1893, c. 295. See also *In re* Wax, 106 Cal., 343; *In re* Mullin, 110 Cal., 252; O'Brien *v.* Spalding, 102 Ga., 490; Denning *v.* Butcher, 91 Iowa, 425.

[6] Holden *v.* Metropolitan L. I. Co., 11 App. Div., 426 (1896); reversed 165 N. Y. 13, see *infra*, n. 7; Foley *v.* Royal Arcanum, 151 N. Y., 196 (1896). But note that these stipulations were made prior to the present amendment of the law (1891, 1893) requiring the waiver to be made upon the trial or examination. See *supra*, pp. 118, 119.

[7] Holden *v.* Metropolitan L. I. Co., 165 N. Y., 13 (1900).

cross-examination could not compel the patient to abandon a privilege which she refused to waive.[1] Fish, J., in delivering the opinion of the court in the last-mentioned case, said of the operation of the statute, that it allows the patient to use the testimony of the attending physician if he thinks his evidence will benefit his case, and to object and exclude it in case he thinks it will not benefit him; he may call to his aid the testimony of any one whose views he approves and exclude that of another whose testimony might tend to controvert that given with the consent of the patient; that in this case the excluded witness was the best witness and could tell nothing else than the patient had disclosed if she had told the truth and it would relate solely to what she and the other physician had described, but that the court could not consider whether the statute tended to promote the cause of justice, and he distinguished *McKinney v. Grand Street Railroad Company*,[2] on the ground that there the consent had been that the same physician should disclose what he knew, while here the waiver of the excluded physician's testimony had been constantly withheld.[3]

A decision which seems to be at variance with *Record v. Village of Saratoga Springs* is *Treanor v. Manhattan Railway Company*,[4] where it was said that the patient cannot promulgate and uncover his maladies and infirmities in court and keep his physician under obligations to silence, and that he cannot, to mulct another in damages, inflame a jury with a false or exaggerated story of his injuries and sufferings and preclude the physician from making a truthful statement of the case. But in *Hennessy v. Kelley* it was held, on appeal, that testi-

[1] Record *v.* Village of Saratoga Springs, 46 Hun, 448 (Supr. Ct., Gen. T., N. Y.). See also Hope *v.* Troy and Lansingburg R. R. Co., 40 Hun, 438; Jones *v.* B., B. & W. E. R. R. Co., 3 N. Y. Supp., 253; Butler *v.* Manhattan Ry. Co., 30 Abb. N. C., 78 (N. Y. Supr. Ct., Gen. T., 1893), s. c. 3 Misc., 453.

[2] *Supra*, p. 132, note 3.

[3] See also Tracey *v.* Metrop. St. Ry. Co., 49 App. Div., 197, affd. 168 N. Y., 653, where it was said that the calling of one of two physicians attending at different times is not a waiver as to the other, and distinguishing Morris *v.* Railway Co., 148 N. Y., 88 (*infra*), where both physicians had attended together, and McKinney *v.* Grand St. Ry. Co., 104 N. Y., 352, where the same physician had testified in a former trial; see also Hennessy *v.* Kelley, 55 App. Div., 449, 66 N. Y. Supp., 871 (1900), reversing 30 Misc., 703, and holding that patient's testimony respecting what took place in presence of one physician is not waiver as to what happened during visit of another.

[4] 28 Abb. N. C., 37 (N. Y. Com. Pl., Gen. T., 1891).

mony of the patient respecting what took place in the presence of one physician, tending to prove his whole condition, does not admit the testimony of another physician who also attended the patient, but was not present at the particular time.[1] While in *Fox v. Union Turnpike Company* a patient detailed his injuries and feelings but did not give his conversations with his physician, nor state what the latter did, and it was held not to be a waiver.[2] And in *Dunkle v. McAllister*[3] it was held not to be a waiver for the patient to testify as to the character of his wound, and in that connection to state what his physician did, when the physician's evidence was offered, not to contradict the patient as to what he did, but as to the character of the wounds.

In *Morris v. New York, Ontario and Western Railroad Company*,[4] the Court of Appeals commented at length upon several of the decisions above cited, and held that when a patient calls one of two physicians, who attended at the same examination or consultation, to prove what there took place, the waiver is complete and every party to the transaction is relieved from the injunction of secrecy. But the patient's calling of his physicians to testify to anterior and subsequent matters is not a waiver of his privilege respecting intermediate communications.[5]

Where the physician was called on a former trial as a witness, it is proper to ascertain who called him, in order to determine whether the patient thereby waived the privilege.[6]

Where the patient testifies as to what passed between him

[1] 55 App. Div., 449, 66 N. Y. Supp., 871 (1900), reversing 30 Misc., 703; see also Metropolitan St. Ry. Co. *v.* Jacobi, 112 Fed. R., 924, where examination by patient of three physicians did not waive privilege as to a fourth not present at same time, citing Hope *v.* R. R. Co., 110 N. Y., 643; see Duggan *v.* Phelps, 81 N. Y. Supp., 916 (1903), where plaintiff calling his physician to testify as to his injuries did not waive privilege as to ambulance surgeon who first saw him.

[2] 59 App. Div., 363, citing Rauh *v.* Deutscher Verein, 29 App. Div., 483, where it was deemed a waiver to testify what operations were performed and the treatment by physicians, and saying that Treanor *v.* Manhattan Ry. Co., 28 Abb. N. C., 47, was disapproved as pushing the principle too far in Morris *v.* N. Y. Ont. and W. R. R., 148 N. Y., 88, and that the question of waiver depends very largely on the extent to which the patient in his testimony enters into the details of his consultation with his physician.

[3] 70 App. Div., 273.

[4] Morris *v.* N. Y., Ont. & W. R. R. Co., 148 N. Y., 88 (1895), reversing s. c., 73 Hun, 560. See Tracey *v* Metropolitan St. Ry. Co., 49 App. Div., 197 (1900).

[5] Barker *v.* Cunard Steamship Co., 91 Hun, 495 (1895), affd. 157 N. Y., 693.

[6] Tracy *v.* Metropolitan St. Ry. Co., 49 App. Div., 197.

and his physician, the physician may testify on the same subject, as a waiver is inferred from the circumstances; for the reason, that the patient, having gone into the privileged domain to get evidence on his own behalf, cannot prevent the other party from assailing such evidence by the only testimony available, and the rule is no longer applicable when the patient himself pretends to give the circumstances of the privileged interview or attendance.[1] Where a patient demanded an affirmative judgment against his physician for malpractice, and testified as to his treatment by various physicians, and examined other physicians as witnesses, he was held to have waived the privilege as to other physicians who had also treated him, as to the matters disclosed.[2] The requirement that a physician file with a board of health a certificate of the cause of death does not abrogate the privilege in a judicial proceeding.[3] Since the amendment of 1893, c. 295 (*supra*, p. 121), in New York, where all of the heirs at law and next of kin of the patient united in asking that his will be declared invalid, and one of them called his attending physician, that was a waiver.[4]

In North Carolina the judge may, in furtherance of the administration of justice, compel a disclosure;[5] and where the patient had in an application for insurance expressly waived for himself and his heirs, assigns, representatives, and beneficiaries, it was regarded as error for the judge to exclude the testimony of his physician in a suit on the policy, by the patient's wife, the beneficiary.[6]

In Wisconsin it is not a waiver for the patient to testify respecting her condition.[7]

The Evidence Excluded.

Affidavits[8] and certificates[9] of the physician containing the

[1] Marx *v.* Manhattan Ry. Co., 56 Hun, 575 (N. Y. Supr. Ct., Gen. T.); Rauh *v.* Deutscher Verein, 29 App. Div., 483.

[2] Hennessy *v.* Kelly, 30 Misc. (N. Y.), 703 (Oneida Co. Ct., 1900).

[3] Buffalo L. & T. Co. *v.* Masonic Mut. Aid Assn., 126 N. Y., 450. By N. Y. Laws 1893, c. 661, s. 22, this certificate is now made presumptive evidence in all courts and places of the facts therein stated. See *supra*, p. 106; *infra*, p. 141, n. 12.

[4] Pringle *v.* Burroughs, 70 App. Div., 12.

[5] *Supra*, p. 100.

[6] Fuller *v.* Knights of Pythias, 129 N. C., 318, 40 S. E. R., 65.

[7] Green *v.* Town of Nebagamain, 113 Wis., 508, 89 N. W. R., 520 (1902).

[8] See Nelson *v.* Nederland L. I. Co. (Iowa), 81 N. W. R., 807.

[9] See *supra*, p. 106, *infra*, p. 141, n. 12.

privileged matter are not admissible where the physician's evidence would not be admissible.

"*Information.*"—In Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Indian Territory, Michigan, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wisconsin the privileged matter is characterized as *information.*[1] But the privileged information is usually only such as is imparted to enable the physician to prescribe or the surgeon to act (see *infra*, title: "Matter Necessary to Enable a Physician to Prescribe or a Surgeon to Act.")

In Arkansas it seems that the information must be a *confidential communication;*[2] but in the other States where it has been necessary to construe the word *information* it has received a broader interpretation.

In California a physician who attended a person killed by accident, in his last illness, cannot disclose his knowledge of the injuries.[3]

In Colorado *information* is privileged, whether deduced from statements of the patient or gathered from professional or surgical examination.[4]

In Iowa the advice given is privileged, and the physician cannot testify whether at another time he treated his patient for another disease, for whatever the advice, the information on which it was based was derived from the patient, and he could only ascertain in the same way whether he suffered from the same or another disease, and the statute does not permit such indirect disclosure.[5] Nor will it permit proof of the privileged matter by the introduction of the proofs of loss submitted to an insurance company by the beneficiary of the deceased patient, and containing an affidavit of the physician that he treated the deceased patient for a specific disease.[6] The physician may state the fact of attendance, but not the condition of his patient, not even that he was sober.[7]

[1] *Supra*, p. 102.

[2] Collins *v.* Mack, 31 Ark., 684. The main point of this decision was that the information was not necessary; see *infra*, p. 143.

[3] Keast *v.* Santa Ysabel Gold Mining Co., 136 Cal., 256, 68 Pac. R. 771.

[4] Colorado F. & I. Co. *v.* Cummings, 8 Col. App., 541 (1896).

[5] Nelson *v.* Nederland L. I. Co., 81 N. W. R., 807 (1900).

[6] *Ibid.*, though the proofs of loss containing the privileged matter were receivable as an admission of the plaintiff beneficiary indicating the invalidity of the policy.

[7] Finegan *v.* City of Sioux City, 83 N. W. R., 907.

In Michigan *information* is not confined to confidential communications made by the patient, but includes whatever in order to enable a physician to prescribe was disclosed to any of his senses and which in any way was brought to his knowledge for that purpose;[1] and consequently he cannot even give his opinion based entirely upon his patient's appearance while treating him and excluding the "knowledge or information" obtained at that time;[2] it covers a letter written to a physician,[3] and matters observed by him;[4] and it includes the character of the patient's ailment,[5] but it does not include information acquired by a third person; for instance, the time when a physician saw his patient may be disclosed by her mother;[6] and the fact of treatment or non-treatment is not *information;*[7] and not only may the fact of non-treatment be shown, but it may also be shown that the reason therefor was that another physician was called in attendance without the consent of the first;[8] nor are the facts that the physician was the patient's family physician, and that he attended him professionally, regarded as *information;* nor are statements of the dates of such attendance and the number of such visits;[9] nor the facts that the physician had been called upon to examine and prescribe for a person and that his patient had told him that she would want him to testify for her in a lawsuit.[10] In a recent case it is said that the prime object of the Act was to invite confidence in respect to ailments of a secret nature, and the spirit of the Act would not include a case where the infirmity was apparent to every one on inspection, but in practice the statute has not been so limited in construction, for the reason that the words of the Act are broad enough to include any information necessary to enable the physician to prescribe or the surgeon to act.[11]

[1] Briggs *v.* Briggs, 20 Mich., 34.

[2] Rose *v.* Supreme Court. Order of Patricians, 85 N. W. R., 1073 (Mich. 1901), distinguishing Edington *v.* Ins. Co., 77 N. Y., 564, where the opinion was based wholly on the appearance at other times.

[3] *Ibid.*

[4] Fraser *v.* Jennison, 42 Mich., 206; Breisenmeister *v.* Supr. Lodge, etc., 45 N. W. Rep., 977 (Supr. Ct. Mich., 1890), s. c. 81 Mich., 525.

[5] Lammiman *v.* Citizens' Street Ry. Co., 112 Mich., 602 (1897).

[6] Dalman *v.* Koning, 54 Mich., 321.

[7] Brown *v.* Mut. L. I. Co., 65 Mich., 306; Dittrich *v.* City of Detroit, 98 Mich., 245. But see Jones *v.* Pref. Bankers' L. I. Co., 79 N. W. Rep., 204 (Supr. Ct. of Mich., 1899).

[8] Dittrich *v.* City of Detroit, 98 Mich., 245 (1893).

[9] Breisenmeister *v.* Sup. Lodge, etc., 45 N. W. Rep., 977, s.c. 81 Mich., 525.

[10] Cooley *v.* Foltz, 48 N. W. Rep., 176, s. c. 85 Mich., 47.

[11] People *v.* De France, 104 Mich., 563 (1895).

In Missouri the statute protects information received *from the patient;* but this is not confined to oral communications, and includes knowledge gained by inspection of the patient's person.[1] It may be deduced from silence, it is broader than *communication*, therefore a physician has been precluded from testifying that his patient made no complaint or statement.[2] In *Linz v. Massachusetts Mutual Life Insurance Company* protection was said not to extend to information of this sort apparent on casual inspection, which any one might make, nor to symptoms which are obvious before the patient submits himself to any examination, such as an inflamed face, a bloodshot eye, alcoholic fumes, or delirium; nor to facts so superficial that in regard to them no confidence could have been reposed. But this distinction between hidden and patent facts is disapproved in *Kling v. City of Kansas*,[3] and the statement is made that the law does not rest on the confidence imposed. Knowledge or communications concerning the cause of a patient's condition and the extent of his injuries have also been held to be included in the term information, because the disclosure of these matters involved the indirect disclosure of the condition;[4] but it was said that the physician may testify as to knowledge acquired independent of communications from the patient and of examination or inspection made by the witness for the purpose of treatment.[5] And the physician may testify how many times he attended.[6] As divulging privileged information, a physician has not been allowed to answer what his patient's hurts were, why he left a hospital, or whether he required longer treatment;[7] and it has also been held that a physician cannot give his opinion as to the mental condition of his patient based upon privileged knowledge;[8] nor can a surgeon testify as to the condition of a bone in a leg which he amputated,

[1] Linz *v.* Mass. Mut. L. I. Co., 8 Mo. App., 363; Gartside *v.* Conn. Mut. L. I. Co., 76 Mo., 446 (said to be overruled by 85 Mo., 249; see 89 Mo., 226, but followed in Thompson *v.* Ish, 99 Mo., 160). See Haworth *v.* Kansas City So. Ry. Co., 68 S. W. R., 111 (Mo. App., 1902). For an argument on the distinction between *information* and *communications*, see brief of respondent's counsel in Gartside *v.* Conn. Mut. L. I. Co.

[2] Smart *v.* Kansas City, 91 Mo., App., 586 (1901).

[3] 27 Mo. App., 231 (1887).

[4] Streeter *v.* City of Breckenridge, 23 Mo. App., 244.

[5] *Ibid.*

[6] James *v.* Kansas City, 85 Mo. App. 20 (1900).

[7] Corbett *v.* St. L., I. M. & S. Ry. Co., 26 Mo. App., 621.

[8] Thompson *v.* Ish, 99 Mo., 160.

and which he subsequently examined after the relation of surgeon and patient had ceased; for it was deemed a part of and continuation of information received while the leg was a part of the patient's body, and while he was deciding whether it was necessary to amputate, and also because information obtained from the leg though severed from the body was information obtained by observation and examination.[1]

In New York *information* comprehends all knowledge acquired by the physician by communication, observation, or inspection,[2] including the patient's statements as to his previous condition of health;[3] it has been said to extend to all facts which necessarily come to the knowledge of the physician in a given professional case;[4] and it includes as well the opinion of the physician based upon his knowledge as the knowledge itself.[5] It also includes knowledge of an ailment for which the physician did not treat the patient, but of which the physician learned as a necessary incident to his professional examination for the purpose of treatment.[6] But the physician can give his opinion as an expert, excluding all knowledge or information acquired from the relation of physician and patient.[7]

The physician cannot disclose the nature of his patient's disease, whether he learned it by observation or examination or from what his patient told him;[8] nor can he testify as to what he told his patient;[9] nor by *innuendo*, can he disclose what he is forbidden to disclose directly.[10] In *Edington v. Ætna Life Insurance Company*[11] it was said by Judge Earl that the

[1] Smart *v.* Kansas City, 91 Mo. App., 586 (1901), and it is said *obiter* that a physician and surgeon cannot be permitted to take a discharge of patient's blood or urine and after the professional attendance ceases tell what he learns therefrom.

[2] People *v.* Stout, 3 Park Cr. Rep., 670. See Enright *v.* Brooklyn Heights R. R. Co., 26 App. Div., 538.

[3] Barker *v.* Cunard Steamship Co., 91 Hun, 495 (1895), affd. 157 N. Y., 693.

[4] Edington *v.* Mut. L. I. Co., 5 Hun, 1; s. p., 67 N. Y., 185; Grattan *v.* Met. L. I. Co., 80 N. Y., 281.

[5] Grattan *v.* Met. L. I. Co., 80 N. Y., 281; Van Orman *v.* Van Orman, 34 N. Y. St. Rep., 824 (Supr. Ct., G. T.); Wilcox *v.* Wilcox, 46 Hun, 32.

[6] Nelson *v.* Village of Oneida, 156 N. Y., 219 (1898).

[7] *Infra*, p. 153, n. 8.

[8] Sloan *v.* N. Y. C. R. R. Co., 45 N. Y., 125; Dilleber *v.* Home L. I. Co., 69 N. Y., 256.

[9] Cahen *v.* Continental L. I. Co., 69 N. Y., 300.

[10] See McCormick *v.* United Life Ins. Assn., 79 Hun, 340, where the Court disapproved of testimony of physicians that they were specialists and had treated the patient, because it led to the inference that the treatment was for the disease in which the physicians were specialists.

[11] 77 N. Y., 564.

statute was aimed at confidential communications and secret ailments, and that it did not extend to matters superficially apparent, such as a fever, a fractured leg or skull, or raving mania apparent to all;[1] but this view was disapproved expressly in the later case of *Renihan v. Dennin*,[2] and in *Griffiths v. Metropolitan Street Railway Company*[3] it was said that the information need not be confidential in its nature. The physician can, however, it is said, testify to any knowledge obtained from personal acquaintance before professional relations commenced and after they ceased, provided he excludes all knowledge obtained during the pendency of the relation.[4]

The privileged information has been said to include knowledge acquired through the statements of others surrounding the patient.[5] But it would seem that the fact that a third person was present during a physician's visit may be shown by the physician, as well as what passed between the patient and the third person, if it was such information as a layman would have gathered.[6] The information from the third person regarding the patient is protected even though the patient be absent;[7] but not if the third person does not employ the physician, and the information thus acquired is not necessary to enable the physician to act in a professional capacity.[8] It is suggested in one case, but not determined, that it would be improper for a physician to state the value of the services of a nurse in attendance upon his patient, as that would involve a consideration of the condition of his patient;[9] but it has been held that a physician can testify to the fact of a nurse's services.[10] And, in a more recent New York trial, instead of refusing to permit surgeons who saw an operation to give their opinion of the value of the services, they were permitted to state the value, but were not permitted to state the facts within their knowledge upon which

[1] See also Staunton *v.* Parker, 19 Hun, 55; matter of Loewenstine, 2 Misc., 323.

[2] 103 N. Y., 573; see also Grattan *v.* Met. L. I. Co., 80 N. Y., 281.

[3] 171 N. Y., 106.

[4] Matter of Loewenstine, 2 Misc., 323 (N. Y. Com. Pl., Gen. T., 1893); see *infra*, p. 153, n. 8.

[5] Grattan *v.* Nat. L. I. Co. of U. S., 15 Hun, 74; Edington *v.* Mut. L. I. Co., 5 Hun, 1; see s. c., 67 N. Y., 185.

[6] Per Smith, J., in Steele *v.* Ward, 30 Hun, 555.

[7] People *v.* Brower, 53 Hun, 217.

[8] People *v.* Harris, 136 N. Y., 423.

[9] Burley *v.* Barnhard, 9 N. Y. St. Rep., 587 (Supr. Ct., G. T., 1887).

[10] Pandjiris *v.* McQuillen, 37 N. Y. St. Rep., 602 (Supr. Ct., G. T., 1891).

they based their estimate, thus modifying on the ground of necessity the usual rule that an expert cannot give his opinion based on knowledge of facts without disclosing the facts.[1]

But it is information regarding the patient that is privileged, and therefore a physician may disclose what his patient told him about another, even though the subject of inquiry be the attitude of the patient toward the other;[2] and likewise the physician may disclose what he told his patient about a third person;[3] so also the physician may testify as to family events in no way connected with physical complaints.[4] It has been held, too, that admissions made by a patient to his physician, tending to show contributory negligence on the part of the patient, at a time when the communication could not well have been made to enable the physician to prescribe, namely, on the physician's third and last visit, may be proven by the physician.[5]

The physician may properly testify that he did attend as physician,[6] and that the patient was sick, and he can state when and how often he attended him,[7] and whether his knowledge was acquired while in professional attendance,[8] but it is open to the Court to determine from the evidence whether it was so acquired.[9] In one New York case, testimony of physicians that they were specialists and treated the patient professionally, was disapproved, as violating the spirit of the law, because leading to the inference that the treatment was for the ailment as to which the physicians were specialists.[10] The physician cannot state the cause of his patient's death;[11] nor is the form of his testimony material, it can no more be proved by the death certificate which the physician is required to file with the Board of Health than by the physician's direct testimony.[12]

[1] MacEvitt *v.* Maass, 33 Misc., 552 (Kings Co. trial term, Gaynor J.).

[2] Hoyt *v.* Hoyt, 9 N. Y. St. Rep., 731 (Supr. Ct., G. T., 1887).

[3] *Ibid.*

[4] In matter of Boury, 8 N. Y. St. Rep., 809 (Supr. Ct., G. T., 1889).

[5] Brown *v.* R. W. & O. R. R. Co., 45 Hun, 439.

[6] Numirich *v.* Supr. Lodge K. & L. of H., 3 N. Y. Supp., 552 (Trial Term, City Ct. of N. Y., 1889); Patten *v.* U. L. & A. Ins. Assn., 133 N. Y., 450.

[7] Patten *v.* United L. & A. Ins. Assn., 133 N. Y., 450. See Van Allen *v.* Gordon, 83 Hun, 379 (1894).

[8] In matter of Darragh, 15 N. Y. St. Rep., 452 (N. Y. Surr.).

[9] In matter of Darragh, 52 Hun, 591 (Supr. Ct., G. T.), see *infra*, p. 166.

[10] McCormick *v.* United Life Ins. Assn., 79 Hun, 340.

[11] Robinson *v.* Supreme Commandery, 77 App. Div., 215, 79 N. Y. Supp., 13 (1902), see *supra*, p. 106; *infra*, p. 169.

[12] Davis *v.* Supreme Knights of Honor, 165 N. Y., 159, see *supra*, p. 108.

In Utah it is immaterial whether the information is obtained directly from the lips of the patient or from observation or from those present at the time of the examination;[1] and the physician is not permitted to tell what he saw without his patient's consent,[1] nor to express an opinion in a will contest as to a deceased patient's sanity.[2]

In Wisconsin testimony of physicians that they treated a patient for a disease has been said to be privileged,[3] and the disclosure by the physician of all that the patient communicated and of all that the physician discovered is a violation of the statute.[4]

"*Matter Communicated.*"—In Indiana the protection now covers *matter communicated.* This includes all declarations made and facts known, where the knowledge thereof is derived from communications of the patient who applies to the physician and makes disclosures to him in his professional character, whether learned directly from the patient or acquired by the physician through his own observation or examination, and all disclosures made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other, but further it does not extend.[5] An earlier statute in that State applied to "matters confided," and it was held to cover matters learned by observation or examination, or by communication from the patient, whether learned under an injunction of secrecy, express or implied, or not;[6] and it has been held that the law forbids the disclosure of matters learned in a sick-room, no matter how the knowledge may have been acquired.[7] But in a later case, while it was said that disclosures cannot be made by persons other than the physician, provided their intervention is strictly necessary to enable the parties to communicate with each other, still if parties holding confidential relations hold their conversation in the presence and hearing of third persons, whether necessarily present as officers or indifferent bystanders, such third persons are not prohibited from testifying what they

[1] Munz *v.* Salt Lake City R. Co., 70 Pac. R., 852 (1902).

[2] *In re* Van Alstine's Est., 72 Pac. R., 942 (Utah, 1903).

[3] McGowan *v.* Supr. Ct. Order of Foresters, 104 Wis., 173, 80 N. W. Rep., 603 (1899).

[4] Shafer *v.* City of Eau Claire, 105 Wis., 239, 81 N. W. Rep., 409 (1900).

[5] Springer *v.* Byram, 137 Ind., 15 (1893).

[6] Masonic Mut. Ben. Assn. *v.* Beck, 77 Ind., 203.

[7] Heuston *v.* Simpson, 115 Ind., 62; Penna. Co *v.* Marion, 123 Ind., 415.

heard; and it was held that two persons in charge of an ambulance sent to convey the patient might disclose what passed in their presence between physician and patient.[1] Such matter includes what the physician has learned by observation.[2] And it was said *obiter* to include knowledge gained by observation of the person who accompanied the patient upon a visit to the physician; it was also said that the privileged matter included knowledge of the physical condition of a child born to the patient.[2] It includes also an *x*-ray photograph or skiagraph.[3]

"*Confidential Communications.*"—The laws of Iowa and Nebraska protect confidential communications properly intrusted. The construction put upon the word *confided* in Indiana has been shown.[4] In Iowa it has been said that a confidential inquiry for advice to facilitate the commission of a crime or the infraction of law, is not properly intrusted and is not privileged;[5] but where the advice is sought for a purpose which may or may not be lawful, the presumption is that it is lawful, and the communication is privileged.[6] Where the consultation was not for treatment but to secure the physician's testimony as a witness, it was nevertheless privileged,[7] and it was there said that whenever an injured party consults a physician as physician and discloses his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, he is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party. Where a third person is present, the presence of the physician does not make the communication to such third person confidential if not so in fact.[8] It has been said that whether or not a physician treated a person for a particular disease, is not a confidential communication;[9] nor

[1] Springer *v.* Byram, 137 Ind., 15 (1893). See p. 157.

[2] Post *v.* State *ex rel.* Hill, 14 Ind. App., 452 (1895). See Citizens' St. R. Co. *v.* Shepherd, 65 N. E. R., 765 Ind. App. (1902).

[3] Aspy *v.* Botkins, 66 N. E. R., 462 (Ind., 1903).

[4] *Supra*, p. 142.

[5] Guptill *v.* Verback, 58 Iowa, 98, see *supra*, p. 107.

[6] Guptill *v.* Verback, 58 Iowa, 98.

[7] Doran *v.* Cedar Rapids & M. C. Ry. Co., 90 N. W. R., 815 (Iowa, 1902).

[8] Sutcliffe *v.* Iowa State Travelling Men's Assn., 93 N. W. R., 90 (Iowa, 1903).

[9] McConnell *v.* City of Osage, 45 N. W. Rep., 550, s.c. 80 Iowa, 293. Cf. *supra*, p. 136, n. 5, 7; p. 139. n. 5; p. 141, n. 8; p. 143, n. 7; p. 144, n. 3. Nelson *v.* Nederland L. I. Co., 81 N. W. R., 807 (Iowa, 1900).

that he was consulted in a professional capacity, nor the date of consultation, nor that he prescribed for the patient.[1]

Ordinarily, the word *confidential* is not narrowly construed, for a physician has been prevented from disclosing whether his patient said that a car was in motion when he was injured, because the injury would be more severe if in motion;[2] and the fact that the physician's partner was present does not remove the seal of secrecy, or permit the partner to testify.[3] The prohibition is said not to be confined to verbal communications, but to extend to facts which are learned by a physician in the discharge of his duties, from his own observation and examination of the patient.[4] But the physician may testify that he was consulted in a professional capacity and that he prescribed; such evidence, it is said, has reference to the relation and not to any communication.[5] He may also testify that he was the patient's family physician and may give the dates and number of his visits.[6] He may not disclose his advice nor his prescription, nor that the treatment was for a different disease than that mentioned in a question addressed to him, both of these matters being regarded as indirect ways of ascertaining the privileged communication.[7] But he may refresh his memory as to dates from his prescriptions.[8]

"*Communications.*"—In Ohio and Wyoming *communications* are privileged; and in Kansas and Oklahoma communications with reference to a physical or supposed physical disease and any knowledge obtained by a personal examination of a patient. It does not appear whether a narrower construction would be given to the term *communications* than to the term *information;* but it would seem not, if a person deprived of speech is to be protected,[9] or if the term *communications* is not to be construed as meaning *oral communications.* In Kansas

[1] Nelson *v.* Nederland L. I. Co., *supra.*

[2] Raymond *v.* Burlington, C. R. & N. Ry. Co., 65 Iowa, 152. Cf. *supra*, p. 141, n. 5; *infra*, p. 157, n. 6.

[3] *Ibid.*

[4] Prader *v.* Accident Association, 95 Iowa, 149 (1895). Sovereign Camp of Woodmen *v.* Grandon, 89 N. W. R., 448 (Neb., 1902).

[5] Nelson *v.* Nederland Life Ins. Co., 81 N. W. Rep., 807 (Supr Ct. of Iowa, 1900).

[6] Sovereign Camp of Woodmen *v.* Grandon, 89 N. W. R., 448 (Neb.).

[7] Nelson *v.* Nederland Life Ins. Co., *supra.*

[8] Nelson *v.* Nederland Life Ins. Co., *supra.*

[9] See argument in Edington *v.* Mut. L. I. Co., 67 N. Y., 185. See argument for difference between *information* and *communications* in brief for respondent, Gartside *v.* Conn. Mut. L. I. Co., 76 Mo., 46.

it has been held that a communication from patient to physician, not relating to the patient's physical ailment, is not privileged.[1] In Kansas, however, where a private examination of a woman was made to enable a physician to disclose her condition to the reputed father of her expected child and to her parents, the communication as to the time when first connection took place was deemed not to be confidential, and therefore not privileged.[2]

"*From the Patient; by the Patient.*"—The former qualifying terms are used in the statutes of Arkansas, Indian Territory, and Missouri; the latter in the statutes of Indiana, Kansas, Oklahoma, and Wyoming. The liberal interpretation put upon this term in the Missouri law has already been shown.[3] The law of the Indian Territory is adopted from Arkansas.[4] The statute is strictly construed in Arkansas,[5] but this term does not seem to have received interpretation. In Iowa it is said that the prohibition is not limited to communications with the patient, but applies to all communications indicated in the statute, from whatever source, and is applicable to communications between physicians attending or consulting in the same case.[6] *From the patient*, includes the result of observation of a severed leg amputated by a surgeon, or of his blood or urine.[7]

In Utah, it is said that it is immaterial whether the information is obtained direct from the lips of the patient or from observation or from those present at the time of the examination.[8]

"*Advice.*"—The laws of Indiana, Ohio, and Wyoming expressly cover the physician's advice. In Iowa,[9] and in New York it is incompetent for the physician to disclose what he told his patient;[10] but advice to a patient concerning a third person is not privileged.[11] In Wisconsin advice, not with reference to treatment of disease, but with reference to an ap-

[1] Kansas City, Fort Scott & Memphis R. R. Co. *v.* Murray, 55 Kan., 336 (1895).

[2] Clark *v.* State, 61 Pac. R., 814, 8 Kan. App., 782 (1899).

[3] *Supra*, p. 138.

[4] Act of Congress, May 2d, 1890, c. 182; see *supra*, p. 99, n. 6.

[5] Collins *v.* Mack, 31 Ark., 684.

[6] State *v.* Smith, 99 Iowa, 26 (1896). Finegan *v.* City of Sioux City, 83 N. W. R., 907 (1900).

[7] Smart *v.* Kansas City, 91 Mo. App., 586 (1901).

[8] Munz *v.* Salt Lake City Ry. Co., 70 Pac. R., 852 (1902).

[9] Nelson *v.* Nederland L. I. Co., 81 N. W. R., 807 (1900).

[10] Cahen *v.* Continental L. I. Co., 69 N. Y., 300; see Grattan *v.* Met. L. I. Co., 24 Hun, 43.

[11] Hoyt *v.* Hoyt, 112 N. Y., 493.

plication for discharge from guardianship as an insane person, and the information acquired for the purpose of such advice, have been held not to be privileged.[1]

The Relation of Physician and Patient.—Under each of the statutes, the relation of physician and patient must have existed at the time the information was acquired. In those cases where the relation is established by agreement and is recognized by both physician and patient as existing, no difficulty arises in determining that it does exist. It is in those cases where some one of these elements is lacking that the difficulties are met. They are illustrated by the cases cited below.

In California it has been held that the relation exists where a physician attends and prescribes for a person, notwithstanding he was employed by another, who seeks to disclose the evidence;[2] but that it does not exist between a physician and a dead body.[3]

In Colorado the relation was held to exist between an injured employee and a hospital physician who treats him, though the hospital is maintained and the physician paid by the employer out of funds deducted from employee's wages;[4] but not where the examination of the defendant by the physician was agreed to between the prosecution and the defendant for the express purpose of enabling the physician to testify as to the defendant's mental condition.[5]

In Iowa a surgeon in the employ of a railroad company visited an injured man at the instance of the railroad company and in his capacity as its surgeon, to ascertain the extent of the injuries, and how they were received, to diagnose the case, consult the attending physician, approve or disapprove the treatment, and if necessary to administer treatment; he informed the man why he had called, and reduced to writing his statement as to the circumstances of the accident; the relation of physician and patient was deemed established, and all of the

[1] Will of Bruendl, 102 Wis., 45 (1899).

[2] Freel *v.* Market St. Cable Ry. Co., 31 Pac. Rep., 730, s. c. 97 Cal., 40. But secs. 2214 *et seq.* of Pol. Code of Cal. provide for the examination of an alleged insane person by physicians and the disclosure of the results.

[3] Harrison *v.* Sutter St. Ry. Co., 116 Cal., 156.

[4] Colorado Fuel & Iron Co. *v.* Cummings, 46 Pac. Rep., 875 (1896), s. c. 8 Col. App., 541.

[5] Nesbit *v.* People, 19 Col., 441 (1894).

information was regarded as privileged.[1] So also the relation was deemed established where the consultation was not for the purpose of treatment but to get the physician's testimony as a witness.[2] But where physicians forcibly examined a person against his will the relation was not deemed established (though excluded on the ground that the method adopted was compelling accused to testify against himself[3]).

In Indiana a physician was allowed to disclose what he learned and saw while collecting a bill for professional services previously rendered.[4] But where a physician was paid by a railroad company to attend a person injured on the railroad, the relation of physician and patient arose between the physician and the person attended, and the physician was not suffered to testify at the instance of the railroad company.[5]

Where a physician was consulted by one person in behalf of another and declined to have anything to do with the case, it was held in Iowa that the relation of physician and patient did not arise.[6] Where a railroad company employed a surgeon to ascertain the extent of the injuries to its employee, how they were received, to diagnose the case, to consult the attending physician, to approve or disapprove the treatment, and if necessary to administer treatment, and the surgeon informed the employee why he had called, and reduced the employee's statements to writing, and the latter signed them, the statements and the surgeon's evidence of other statements made by the employee were both held inadmissible testimony under the Iowa statute.[7]

In Kansas a physician examined a woman in order to ascertain how far gone in pregnancy she was, so that a man might determine whether to acknowledge his paternity of the expected child, it was held that she was not a patient.[8]

In Louisiana where the Court ordered the coroner to examine

[1] Keist *v.* Chic. G. W. Ry. Co., 81 N. W. R., 181 (1899). Cf. with New York cases where information as to how an accident occurred is not deemed privileged, *infra*, p. 157, n. 6.

[2] Doran *v.* Cedar Rapids & M. C. Ry. Co., 90 N. W. R., 815 (Iowa, 1902).

[3] State *v.* Height, 91 N. W. R., 935 (Iowa, 1902).

[4] Bower *v.* Bower, 142 Ind., 194 (1895); Seifert *v.* State, 67 N. E. R., 100.

[5] N. Y., Ch. & St. Louis R. R. Co. *v.* Mushrush, 11 Ind. App., 192 (1894).

[6] State *v.* Smith, 99 Iowa, 26 (1896).

[7] Keist *v.* Chicago G. W. Ry. Co., 81 N. W. Rep., 181 (Supr. Ct. of Iowa, 1899).

[8] Clark *v.* State, 8 Kan. App. 782, 61 Pac. R., 814 (1899).

an accused person to ascertain whether he was suffering with a venereal disease, it was said the coroner's information was not privileged: but the decision was also based on the ground that as the accused testified that he was suffering with the disease, he was not injured by the testimony.[1]

In Michigan, where the physician was employed by direction of the prosecuting attorney to examine the defendant in jail, and so notified the defendant at the outset of the examination, and he submitted voluntarily to a personal examination, and there was no intention to prescribe or to act as the defendant's physician, it was held that the relation did not exist, and that the physician could testify as to the defendant's physical condition.[2]

In Missouri a physician employed by the defendant in a suit for personal injuries, to examine the person injured in order to prescribe, may not testify as to the results of such examination unless it appears that the patient was advised that the physician came to examine her in the interest of the defendant and not in her own interest.[3] But in a similar case the physician was permitted to testify that the plaintiff walked away from his office and he did not notice anything wrong about his walking, and that he afterward saw him in Court and asked him how he was treated in hospital and he said all right, though he was not permitted to disclose other information which he had learned while actually treating him, nor to state the result of his examination.[4] It makes no difference by whom the physician was paid.[5] Independent information received after the relation has ceased is not privileged, but information obtained after cessation of the relation from sources which were made available as the immediate result of the relation is still privileged, such as observation of a severed member or of blood or urine taken from the patient but not examined till the relation has ceased.[6] A physician cannot be permitted to use the means which he obtains in his professional capacity to gain information after that capacity ceases, for the use of the Courts or the public.[6]

In one New York case it has been said that the relation is one of contract, and that the test is whether the physician would

[1] State *v.* McCoy, 109 La. 682, 33 So. R., 730 (1903). Cf. *supra*, p. 133.

[2] People *v.* Glover, 71 Mich., 303.

[3] Weitz *v.* Mound City Ry. Co., 53 Mo. App., 39 (1892).

[4] Haworth *v.* Kansas City So. Ry. Co., 68 S. W. R., 111 (Mo. App., 1902).

[5] Noble *v.* Kansas City, 68 S. W. R., 969 (Mo. App., 1902).

[6] Smart *v.* Kansas City, 91 Mo. App., 586 (1901).

be chargeable with malpractice or negligence for failure to advise or prescribe in case the alleged patient were in urgent need of it at the time.[1] But the decisions of the Court of Appeals extend the privilege to cases where this test would lead to a different conclusion.[2] And it is said that the privilege exists when physicians professionally attend a patient who does not voluntarily require their services;[3] and an ambulance surgeon is a physician within this view.[4]

Where the physician to a county jail was called in to attend a prisoner and examined him, though there was no prescription at the time, but it appeared that the doctor told the prisoner what he should prescribe, and subsequently two physicians came to see the prisoner at the instance of the coroner and examined him as they would have examined one of their patients, though they did not prescribe and had no conversation about a prescription, it was held that the prisoner had, under the circumstances, reason to suppose that the relation of physician and patient did exist between him and all three of the physicians, and that their testimony as to what they learned on such visits should have been excluded; and the rule is thus stated: whenever the patient has reason to suppose that the relation exists and does in fact and truth so suppose, in a case in which the physician attends under circumstances calculated to induce the opinion that his visit is of a professional nature, and the visit is so regarded and acted upon by the person attended, the relation of physician and patient contemplated by the statute may fairly be said to exist.[5]

But the fact that it is the duty of a physician to prescribe for a person in case of need, does not constitute the relation, though the position of the physician gives him the opportunity to observe such person; so, therefore, a jail physician was not precluded from testifying as to what he had observed of a prisoner, where it did not appear that he had ever attended the

[1] Per Learned, J., In matter of Freeman, 46 Hun, 458 (Supr. Ct., Gen. T., 1887).

[2] Renihan *v.* Dennin, 103 N. Y., 573; and cases in notes following.

[3] Meyer *v.* Supreme Lodge, 81 N. Y. Supp., 813 (1903).

[4] Duggan *v.* Phelps, 81 N. Y. Supp., 916. See *infra*, p. 157, n. 6.

[5] People *v.* Stout, 3 Park Cr. Rep., 670 (N. Y. Oy. and Ter., 1858); see Grossman *v.* Supreme Lodge, etc., 6 N. Y. Supp., 821 (Gen. T. Supr. Ct., 1889), visiting physician at a hospital attending out of curiosity with regular physician.

latter in a professional capacity or had ever been called on to attend him.[1]

It would seem, however, that where it is the duty of a physician to attend a person in a professional capacity or to acquire knowledge concerning him in such capacity, he cannot disclose information actually acquired in the performance of his duty. It has been said that a medical attendant at an insane asylum cannot testify as to the mental condition of an inmate;[2] and that a physician employed in a hospital to notice and enter in its records the arrival and condition of the patients coming in, cannot testify as to information so acquired.[3]

It is immaterial that another person employs the physician to examine the patient, and to report to the employer, and that the person examined does not appear to desire any knowledge as to his condition; if the examination is made as a professional act, the relation of physician and patient is established between the physician and the person examined, even though it be the only interview.[4]

And in a case where the public prosecutor sent a physician to a person for the purpose of making a professional examination, so as to obtain evidence against another person charged with crime, and the person examined accepted the services of the physician in a professional character, it was held that he could not testify as to the results of his examination.[5]

But where the district attorney sent a physician to jail to make an examination of a prisoner's mental and physical condition, and he made such examination, and it did not appear that he prescribed for or treated the prisoner or that the prisoner accepted his services, the opinion of the physician as to his mental condition was admitted.[6]

Where the defendant employed a physician to examine the plaintiff, and he went as coming from the defendant for that purpose, and examined the plaintiff in the presence of his attending physician, but not as the plaintiff's physician and not for

[1] People *v.* Schuyler, 106 N. Y., 298, affirming 43 Hun, 88.

[2] In matter of Baird, 11 N. Y. St. Rep., 263 (N. Y. Supr. Ct., Chambers, 1887, per Donohue, J.). See *supra*, p. 113.

[3] See 28 Abb. N. C., 55, note.

[4] Grattan *v.* Met. L. I. Co., 24 Hun, 43 (Supr. Ct., Gen. T., 1881); 92 N. Y., 274. Cf. *supra*, p. 146.

[5] People *v.* Murphy, 101 N. Y., 126.

[6] People *v.* Kemmler, 119 N. Y., 580; People *v.* Sliney, 137 N. Y., 570; People *v.* Hoch, 150 N. Y., 291.

the purpose of prescribing, the relation of physician and patient was not established.[1] Where a physician examined the plaintiff at the instance of the plaintiff's physician, but it was not shown that he was requested or expected to treat or prescribe or to advise in respect to either, or that he did either, it was held that the relation was not established;[2] but a physician consulted by the patient's regular physician for the purpose of advice concerning his treatment is a physician contemplated by the statute;[3] as is also the partner of a physician who is present during a conference with the patient or who overhears such a conference.[4] Attendance at the patient's house is not contemplated as essential by the law, and it makes no difference where the examination is conducted.[5] On the other hand attendance at the house of a person to treat other inmates does not constitute the relation, and a physician visiting a house to attend a father and mother has been permitted to disclose what he then observed of their son, whom he did not treat and by whom he was not consulted.[6] But where the physician was also a county clerk and the alleged patient was an attorney, and the consultation took place in the clerk's office and consisted of an examination of an eruption on the skin, which was made gratuitously and without a prescription being made or asked for, the relation was held not to have been established, notwithstanding that the clerk made use of his knowledge and learning as a physician in forming his opinion, and that it was in confidence that he possessed medical skill that the person requested the examination.[7]

In Utah, it is immaterial whether the physician is called by the patient, or a stranger, or an officer of a corporation charged with injuring the patient; the presumption from an examina-

[1] Heath *v.* Broadway & S. A. Ry. Co., 8 N. Y. Supp., 863 (Super. Ct., Gen. T., 1890).

[2] Henry *v.* N. Y., L. E. & W. R. R. Co., 57 Hun, 76 (Supr. Ct., Gen. T., 1890). See matter of Loewenstine, 2 Misc., 223 (N. Y. Com. Pl., Gen. T., 1893).

[3] Renihan *v.* Dennin, 103 N. Y., 573; Jones *v.* B., B. & W. E. Ry. Co., 3 N. Y. Supp., 253.

[4] Ætna L. I. Co. *v.* Deming, 123 Ind., 390; Raymond *v.* B., C. R. & N. Ry. Co., 65 Iowa, 152.

[5] Grattan *v.* Metr. L. I. Co., 24 Hun, 43 (Supr. Ct., Gen. T., 1881).

[6] Jennings *v.* Supreme Council, 81 App. Div., 76, 81 N. Y. Supp., 90.

[7] Edington *v.* Ætna L. I. Co., 13 Hun, 543 (Supr. Ct., Gen. T., 1878), affirmed 77 N. Y., 564. The broad expressions of this latter case were disapproved in Renihan *v.* Dennin, 103 N. Y., 573, but it does not appear that this point was not properly decided.

tion by a physician is that the relation of physician and patient exists.[1]

In Wisconsin, a physician who at the request of an attending physician attended with him is *pro hac vice* an attending physician, though he does not prescribe and makes no examination.[2]

The secrecy growing out of the relationship, as to knowledge acquired during the relationship, always continues unless properly waived; and the physician will not be allowed to testify in regard to matter which is partly the result of such information, though another part may have been acquired independent of the relation.[3] But it does not follow that the relation once established continues always; for instance, in New York, a physician in the employ of a railroad company learned of an accident, volunteered his services and stopped the flow of blood; ten days afterward he was visiting the hospital where the injured person had been taken, saw him and conversed with him; the physician was also visiting physician at the hospital, but the Court of Appeals held that the evidence did not establish the relation of physician and patient on the later visit.[4] Where it is clear that the matter desired is independent of the relation of physician and patient, such evidence is admissible if otherwise competent.[5]

"*Professional Capacity*"—"*Professional Business.*"—The States in which the statutes limit the privilege to information acquired in a professional capacity or in professional business have been enumerated.[6] As to what constitutes a professional capacity, the discussion of the facts that establish the relation of physician and patient, and of the information necessary to enable a physician to prescribe or a surgeon to act, makes it unnecessary to discuss at length the meaning of this phrase. In Indiana a physician has been suffered to disclose what he learned while collecting a bill for services previously

[1] Munz *v.* Salt Lake City, 70 Pac. R., 852.

[2] Green *v.* Town of Nebagamain, 113 Wis., 508, 89 N. W. R., 520 (1902).

[3] In matter of Darragh, 52 Hun, 591 (Supr. Ct., Gen. T., 1889), 15 N. Y. St. Rep., 452 (N. Y. Surr.); Brigham *v.* Gott, 3 N. Y. Supp., 518 (Supr. Ct., Gen. T., 1889).

[4] Griffiths *v.* Metropolitan St. Ry. Co., 171 N. Y., 106, reversing 63 App. D., 86.

[5] Stowell *v.* American Co-op. Assn., 23 N. Y. St. Rep., 766 (Supr. Ct., Gen. T., 1889). Matter of Loewenstine, 2 Misc., 323 (N. Y. Com. Pl., Gen. T., 1893); *infra*, title "professional capacity."

[6] *Supra*, p. 103.

rendered.[1] In Iowa evidence that a physician was consulted in a professional capacity, of the dates of such consultations and that he prescribed for the patient, was not deemed to involve the disclosure of any information obtained professionally,[2] and he may refresh his memory as to dates by reference to his prescriptions. Statements as to health given to a physician when not under employment are not privileged, though the physician may have been employed at other times to treat the patient.[3] The decision in *Linz v. Massachusetts Mutual Life Insurance Company*[4] would make it appear that in Missouri information apparent on a casual inspection which any one might make is not received in a professional capacity, but this idea is disapproved in the later case of *Kling v. City of Kansas.*[5] Information acquired by the physician by observing the patient on the street anterior to his employment as a physician is not received by him in a professional capacity.[6]

In New York, where the physician had not seen the patient before or since his interview for the purpose of treatment, and he was asked what his opinion was, based on a general sight of the man before the examination, it was held that the physician could not properly answer, as all the information upon which the opinion would be based must have been acquired in a professional capacity;[7] but in another case a physician was permitted to express his opinion as to the mental condition of a patient whom he had seen at various times when not in attendance, excluding from his mind any knowledge or information obtained while acting as her medical attendant and confining his answer to such knowledge and information as he had obtained by seeing her when not his patient.[8] It has been said that where information is not such as is obtained on sight by any person, but by removing clothing and by percussion and listening to the action of the lungs, these are professional acts and the information may be considered as obtained professionally.[9]

[1] Bower *v.* Bower, 142 Ind., 194 (1895).
[2] Nelson *v.* Nederland Life Ins. Co., 81 N. W. Rep., 807 (1900).
[3] Herries *v.* City of Waterloo, 86 N. W. R., 306 (Iowa, 1901).
[4] 8 Mo. App , 363.
[5] 27 Mo. App., 231.
[6] Gartside *v.* Conn. Mut. L. I. Co., 76 Mo., 446; see also Burley *v.* Barnhard, 9 N. Y. St. Rep., 587 (N. Y. Supr. Ct., Gen. T.).
[7] Grattan *v.* Metr. L. I. Co., 92 N. Y., 274.
[8] Fisher *v.* Fisher, 129 N. Y., 654; Matter of Loewenstine, 2 Misc., 323.
[9] Grattan *v.* Metr. L. I. Co., 24 Hun, 43 (Supr. Ct., Gen. T., 1881).

It has been said that information received in a professional capacity involves a decision, though it may be negative; and that signing as witness to a will is not a professional act.[1]

It is incumbent on the person who objects to the reception of a physician's evidence to show that the information was acquired in a professional capacity.[2]

Matter Necessary to Enable a Physician to Prescribe or a Surgeon to Act.—A list of those States whose laws limit the privilege to matter necessary to enable the witness to prescribe or act for the patient is to be found in another place.[3]

In Arkansas, where six hours after delivery, the patient stated to her physician who attended at accouchement, that she had never been engaged to marry and never had promised to marry, the statements were held not to be necessary to enable the physician to act.[4]

In California a physician was permitted to testify as to matter which was not information necessary to enable him to prescribe or act for the patient,[5] and in such case to testify as to the mental condition of his patient.[6] And the testimony of a physician as an expert, upon a hypothetical state of facts, has been held proper, though his testimony as to the facts, as facts, was improper and inadmissible.[7]

In Iowa, a physician who had treated a patient for injuries was not allowed to testify whether his patient told him that the car on which he was injured was in motion at the time, because as the injury would be likely to be more severe if the car was in motion, that information was necessary to enable the physician to prescribe.[8] In Kansas, the law protects communications with reference to a physical or supposed physical disease ;[9] this was held not to include an examination to determine how far a woman was advanced in pregnancy.[10]

In Michigan, a physician was allowed to contradict his patient as to when her trouble commenced, in the absence of evi-

[1] Per Learned, J., in Matter of Freeman, 46 Hun, 458.
[2] People *v.* Koerner, 154 N. Y., 355 (1897) ; Griffiths *v.* Metr. St. Ry. Co., 171 N. Y., 106.
[3] *Supra*, p. 103.
[4] Collins *v.* Mack, 31 Ark., 684.
[5] Harris *v.* Zanone, 93 Cal., 59.
[6] Black's Est., 132 Cal., 392, 64 Pac. R., 695 (1901).
[7] *In re* Flint, 100 Cal., 391 (1893).
[8] Raymond *v.* B., C. R. & Nor. Ry. Co., 65 Iowa, 152.
[9] *Supra*, p. 102.
[10] Clark *v.* State, 8 Kan. App., 782, 61 Pac. R., 814 (1899).

dence that such information was necessary to enable him to act.[1] Where a physician was asked whether he treated a person for typhoid fever, and he answered that she was not so diseased, it was held that this information was not necessary to enable him to act.[2] And the same was held to be true where a physician examined a prisoner at the jail and testified that he was diseased, the prisoner having been notified at the time of the examination that it was made by direction of the prosecuting attorney and there being no intention to prescribe or act for the prisoner.[3] It was said that a physician might testify that he refused to attend further because another physician was employed without his consent,[4] such information not being necessary to enable him to prescribe. In another case the physician's testimony that his patient was drunk was admitted, it not appearing that this knowledge was necessary to enable him to prescribe.[5] A woman's communication to her physician respecting the identity of the father of her child was admitted, such information not being necessary to enable the physician to prescribe.[6] But it has been stated that all disclosures by a patient to a physician respecting ailments are privileged, whether necessary to enable the physician to prescribe or not.[7]

In Minnesota, a physician was allowed to disclose statements as to suffering made by his patient, but not for the purpose of enabling him to prescribe or act.[8]

In Missouri, it has been said that information as to the way in which an injury was inflicted is of the greatest necessity for successful treatment; and that it is information which physicians universally demand and receive;[9] and that the examination, the facts disclosed by an examination and the physician's conclusion are alike necessary to enable treatment.[10] In

[1] Campau *v.* North, 39 Mich., 606.
[2] Brown *v.* Metr. L. I. Co., 65 Mich., 306. See Jones *v.* Pref. Bankers L. A. Co., 79 N. W. Rep., 204 (Supr. Ct. of Mich., 1899).
[3] People *v.* Glover, 71 Mich., 303.
[4] Dittrich *v.* City of Detroit, 98 Mich., 245 (1893).
[5] Lincoln *v.* City of Detroit, 101 Mich., 245 (1894).
[6] People *v.* Cole, 113 Mich., 83 (1897).
[7] Breisenmeister *v.* Supr. Lodge, etc., 45 N. W. Rep., 977 (Supr. Ct. Mich., 1890); s. c., 81 Mich., 525.
[8] Jacobs *v.* Cross, 19 Minn., 523.
[9] Norton *v.* City of Moberly, 18 Mo. App., 457. But for a contrary view see De Jong *v.* Erie R. R. Co., 43 App. Div. (N. Y.), 427 (1899); Griebel *v.* Brooklyn Heights R. R. Co., 68 App. Div., 204 (1902); Griffiths *v.* Metr. St. Ry. Co., 171 N. Y., 106; Green *v.* Metr. St. Ry. Co., 171 N. Y., 201.
[10] James *v.* Kansas City, 85 Mo. App., 20 (1900).

another case, with reference to the cause of a patient's condition, it was said that while knowledge of the cause may not be necessary, the disclosure of the cause cannot be made without a disclosure of the condition, and that as a medical person cannot tell indirectly what he is forbidden to tell directly, the physician's evidence of the cause is inadmissible.[1] In another case it was said that any information, necessarily coming to a physician in order to treat his patient, is to be regarded as necessary information though unimportant, and that the test is how it was acquired, not whether it could have been acquired in a different way, and therefore it was incompetent for a physician to testify that his patient was drunk when he treated him.[2] But facts learned from the patient as to his condition and not necessary to enable the physician to act may be disclosed.[3] In this category are facts and conversations respecting the patient's last will.[4]

Under the New York statute, the burden of proof is on the person objecting to the physician's evidence, to show that the information he seeks to exclude was acquired while attending the patient in a professional capacity and also that it was necessary to enable him to perform some professional act.[5] But where the physician testifies positively that his information was such as was necessary to enable him to treat the patient professionally, it is properly excluded.[6] Where the physician testified that the information was not necessary for that purpose and there was no evidence to the contrary, it was error to hold that the information was privileged.[7]

In New York, in an early case,[8] where a man consulted a physician with reference to committing an abortion and told him that a certain woman was pregnant by him, this admission was said not to be essential to enable him to prescribe, even if the relation of physician and patient were considered established; but this seems to be at variance with the later case of *People v.*

[1] Streeter *v.* City of Breckenridge, 23 Mo. App., 244.

[2] Kling *v.* City of Kansas, 27 Mo. App., 231.

[3] James *v.* Kansas City, 85 Mo. App., 20 (1900).

[4] Hamilton *v.* Crowe, 75 S. W. R., 389 (Mo.).

[5] People *v.* Koerner, 154 N. Y., 355 (1897).

[6] Redmond *v.* Industrial Benefit Assn., 78 Hun, 104 (1894), affirmed 150 N. Y., 167. See matter of Johnson, 32 App. Div., 634 (1898).

[7] Griffiths *v.* Metr. St. Ry. Co., 171 N. Y., 106.

[8] Hewitt *v.* Prime, 21 Wend., 77 (N. Y. Supr. Ct. of Judic., 1839). See Edington *v.* Mut. L. I. Co., 67 N. Y., 185.

Brower,[1] where the accused consulted a physician with reference to the treatment of a woman on whom he had attempted to commit an abortion, and admitted that he had done so, and the physician was not permitted to disclose it. A broader view is now taken of the word *necessary*.[2] It has been held by the Court of Appeals that a physician cannot disclose an ailment of which he incidentally learned while making an examination for treatment of another ill,[3] and also that a physician could not testify that his patient had a venereal disease while under his care as a physician, the presumption being that he learned it for the purpose of prescribing;[4] and again, that it is assumed from the relationship that the information would not have been imparted except for the purpose of aiding the physician to prescribe.[5] But this presumption is later said not to be a general rule,[6] and it

[1] 53 Hun, 217 (Supr. Ct., Gen. T., 1889).

[2] See Will of Bruendl, 102 Wis., 45 (1899), for discussion of "necessary."

[3] Nelson *v.* Village of Oneida, 156 N. Y., 219

[4] Sloan *v.* N. Y. C. R. R. Co., 45 N. Y., 125.

[5] Edington *v.* Mut. L. I. Co., 67 N. Y., 185. Approved in Munz *v.* Salt Lake City (Utah, 1902), 70 Pac. R., 852; limited, 171 N. Y., 106. See *infra*, note 6. See also People *v.* Stout, 3 Park Cr. Rep., 670 (N. Y. Oy. and Ter., 1858).

[6] Griffiths *v.* Metr. St. Ry. Co., 171 N. Y., 106. In New York it has been the subject of a great difference of judicial opinion whether a physician may disclose information received from a patient respecting the cause of an accident and its attending circumstances. The dicta of the earlier opinions were to the effect that all disclosures to a physician during his attendance in that relation respecting the cause of his patient's condition are presumptively necessary to enable the physician to act professionally, and are therefore privileged; but the tendency of the later cases is to confine the force of this dictum to the circumstances of the particular cases in which it was uttered, and thus to make it a presumption of fact from the specific circumstances instead of a presumption of law from the general circumstances of the relation, the examination, the disclosure, and the treatment. The effect of the later decisions seems to be that the party seeking to protect the disclosure must show, not alone that the disclosure was made to a physician at a time and under circumstances which would lead a reasonable man to believe it to be a wise part of the statement of the patient's case to his physician (on the theory, as stated in other jurisdictions, that such a narration may well assist the physician in determining the true condition of his patient and the proper treatment), but rather that the disclosure was actually, to the physician's mind, a necessary factor in enabling him to act, thus giving the strictest construction to the word necessary and making the privilege depend upon the condition of the physician's mind rather than upon his patient's purpose at the time of the communication. The earlier cases containing the dicta mentioned, and approved elsewhere, were: Edington *v.* Mut. L. I. Co., 67 N. Y., 185; Feeney *v.* L. I. R. R. Co., 116 N. Y., 375; Sloan *v.* N. Y. C. R. R., 45 N. Y., 125; and these views, applied to cases of treatment of patients injured in accidents, were adopted in Griffiths *v.* Metr. St. Ry. Co., 63 App. Div., 86 (revd.

does not attach to information regarding a patient communicated by a third person.[1]

Where a person went to a physician to call for medicine, and it appeared that he was not consulting for himself and was not representing any one else who needed or desired medical assistance, the physician was allowed to testify as to a conversation which took p'ace at that time.[2]

In the case of *Edington v. Ætna Life Insurance Company*,[3] it was said that before the exclusion, the facts on which it is justified must appear in some way, and the Court must know somewhat of the circumstances; from the opinion it is easy to infer that it is only confidential communications and information as to secret ailments which may be regarded as necessary within the statute; but this view was overruled in *Grattan v. Metropolitan Life Insurance Company*,[4] and there it was distinctly stated that it is enough that the witness acquired the information in his character as physician and in the due and proper exercise of his calling, and that it is not incumbent on the person objecting, to show by formal proof that the information was necessary to enable the witness to prescribe. In this case the examination of the witness was as to the cause of his patient's death, and the argument urged upon the attention of the Court was that information regarding the cause of death could not be necessary to enable the physician to prescribe, as the utility of the prescription ceased with the death and before

171 N. Y., 106), and Green *v.* Metr. St. Ry. Co., 65 App. Div., 54 (revd. 171 N. Y., 201). But the Court of Appeals, in reversing the two last-mentioned cases, and the Appellate Division (2d Dept.) in Griebel *v.* Brooklyn Heights R. R. Co., 68 App. Div., 204 (1902), seem to have adopted the rigorous view above expressed. In the Griebel case, a statement made to an ambulance surgeon in attendance upon a man injured in an accident, as to how the accident happened, was admitted over objection; in the Griffiths case, the statement was made in the hospital at a subsequent visit of the physician who had first treated the patient, but who was not then treating him; and in the Green case the disclosure was exacted from the house physician at a hospital, who had secured the information from the patient under the rules of the hospital in order to enter it in the hospital books. In the last case three judges dissented, Judge Werner saying that an intelligent and skilful physician might much more surely ascertain the probable or possible nature or extent of the injury by getting at the facts of the accident than he could by the usual methods of the diagnostician.

[1] People *v.* Harris, 136 N. Y., 423.

[2] Babcock *v.* People, 15 Hun, 347; see also People *v.* Harris, *supra*.

[3] 77 N. Y., 564; see also s. p. 17 W. D., 566.

[4] 80 N. Y., 281; but *cf.* People *v.* Koerner, 154 N. Y., 355 (1897).

the cause was determined ; but the Court held that the privilege attached, because, although the death was the result of the cause, the facts constituting the cause were learned while the physician was attending the living patient in a professional capacity and from the symptoms manifested at that time.

In consonance with the decision in *Grattan v. Metropolitan Life Insurance Company*,[1] it has been held that a physician who amputated a patient's leg could not testify as to its condition at the time it was amputated.[2]

The fact that the physician does not prescribe does not defeat the privilege; if the information is acquired in the course of professional employment the statute operates, for the decision that neither advice nor medicine is needed is a professional act within the spirit of the law.[3] *Medicus optimus, medicamentum minimum*, is the maxim used in another case to illustrate this point.[4]

But it cannot be predicated as matter of law that a physician cannot exclude from his consideration facts learned or opinions formed while attending as physician: therefore he can testify as to his opinion on hypothetical facts which might be deemed to relate to another person as well as the patient, excluding all knowledge or information received from the relation of physician and patient;[5] and where the physician testified that he could so form an opinion, his opinion upon such assumptions was held to be admissible in evidence as expert testimony.[6]

It is not all information, however, which will be presumed to have been necessary to enable the physician to act; it seems that where the knowledge is such that it is evidently immaterial to the physician's decision, it will be admitted. Such a case is that of *Hoyt v. Hoyt*,[7] where the testimony of physicians was admitted to show the attitude of their patient toward his daughter and their advice to him concerning her, the evidence being

[1] 80 N. Y., 281.

[2] Jones *v.* Brooklyn, Bath and West End Ry. Co., 3 N. Y. Supp., 253 (City Ct. of Brooklyn, Gen. T., 1888).

[3] Grattan *v.* Metr. L. I. Co., 24 Hun, 43 (Supr. Ct., Gen. T., 1881).

[4] In matter of Freeman, 46 Hun, 458. For discussion of meaning of "prescribe" see Will of Bruendl, 102 Wis., 45 (1899).

[5] Meyer *v.* Standard L. & A. Ins. Co., 8 App. Div. (N. Y.), 74 (1896).

[6] People *v.* Schuyler, 43 Hun, 88, affirmed 106 N. Y., 298.

[7] 9 N. Y. St. Rep., 731 (Supr. Ct., Gen. T.), affirmed 112 N. Y., 493. Although this point was discussed, the case was really decided on the ground that the objector had lost her right to object if she ever had it.

for the purpose of showing the testator's opinion and not the physicians'. It has also been held that a statement made by a patient on the physician's last visit as to what occurred at the time the patient was injured, tending to show contributory negligence, was not necessary information.[1] And a physician's evidence of the declaration of his patient as to making a will and the doctor's advice on that subject have been admitted.[2] A physician's testimony that his patient told him he did not see a train by which he was struck, has been held admissible, though the physician treated the patient for the injury caused by the train.[3]

In Wisconsin statements of the patient concerning his previous condition and the circumstances of his injury have been excluded on the physician's statement that these facts were necessary for him to know in order to enable him to treat the case intelligently.[4] But where the physician examined a lunatic, not for the purpose of curing or helping her, but to determine her mental competency with a view to making application for her discharge from guardianship, information so obtained was held not necessary to enable him to prescribe, and therefore not privileged,[5] the Court, Dodge, J., saying, "the purpose to cure or alleviate is an essential element in the meaning of the words to prescribe as a physician."

THE PROVINCE OF THE COURT IN DEALING WITH THE PRIVILEGE.

All questions of the competency of evidence are solved by the Court and not by the jury.[6] The facts establishing the privilege are presented to the Court for its consideration.[7] Where the communication is privileged, and the patient is an infant, and the waiver by his guardian, the Court is said to be empowered to inquire whether the waiver is for the infant's interest and to overrule the waiver and exclude the testimony

[1] Brown *v.* R. W. & O. R. R. Co., 45 Hun, 439 (Supr. Ct., Gen. T.). See *supra*, p. 141.

[2] In matter of O'Neil, 26 N. Y. St. Rep., 242; 7 N. Y. Supp., 197 (N. Y. Surr., 1889).

[3] De Jong *v.* Erie R. R., 43 App. Div. (N. Y.), 427. See *supra*, p. 157, n. 6.

[4] Kenyon *v.* City of Mondovi, 98 Wis., 50 (1897).

[5] Will of Bruendl, 102 Wis., 45 (1899).

[6] Taylor, Ev., s. 2; Greenleaf, Ev., s. 2.

[7] Bowles *v.* Kansas City, 51 Mo. App., 416 (1892).

if it is to the infant's prejudice.[1] In such a case where the infant and his mother were in court, and the father was plaintiff, and waived his infant son's privilege in his own interest, it was presumed that the infant (seventeen years of age) and his mother acquiesced in the father's waiver.[1] In Iowa it has been held that a fair trial demands that it should not be made to appear to the jury in an action that the patient is reluctant to waive his privilege, and that therefore the subject-matter of waiver has no place in the taking of testimony except when introduced by the party permitted to make it, and the Court should not allow the patient to be asked to answer under oath whether he is willing to waive his privilege.[2]

Whether it is the duty of the Court to enforce the privilege where it is apparent and the patient is not present to object, is a question that seems to be variously regarded. In Indiana a court has refused a new trial for newly discovered evidence of the privileged sort, on the ground that if objection were made on the new trial it would be rejected.[3] But where the evidence of a physician to contradict another physician, who was witness to a will, was received without objection, it was said that it should not be withdrawn by the Court from the consideration of the jury or its value commented on as a matter of law.[4]

In Michigan, it has been said that a commissioner, whose ordinary duty is to take all evidence offered, should refuse to take this privileged evidence; and that it should be stricken out without motion by the judge when returned by the commissioner, and that the physician should not be allowed to violate the privilege.[5] It has also been held that an order for the compulsory physical examination of a person by a physician for the purpose of testifying should not be granted, and that evidence so obtained should be stricken out, but on the ground that it was a violation of personal liberty, rather than of statutory privilege.[6] On the

[1] Corey *v.* Bolton, 31 Misc., 138 (App. Term N. Y. Supr. Ct., 1900).

[2] McConnell *v.* City of Osage, 45 N. W. Rep., 550, s. c. 80 Iowa, 293. See *infra*, p. 164.

[3] Harris *v.* Rupel, 14 Ind., 209; Post *v.* State *ex rel.* Hill, 14 Ind. App., 452 (1895).

[4] Van Valkenberg *v.* Van Valkenberg, 90 Ind., 433.

[5] Storrs *v.* Scougale, 48 Mich., 387; see also Dotton *v.* Albion, 24 N. W. Rep., 786, s. c. 57 Mich., 575.

[6] Page *v.* Page, 51 Mich., 88; see also McQuigan *v.* D. & L. R. R. Co., 129 N. Y., 50; Roberts *v.* Ogdensburgh, etc., Ry. Co., 29 Hun, 158; McSwyny *v.* Broadway & S. A. Ry. Co., 7 N. Y. Supp., 459; and cf. N. Y. Code Civ. Pro., s. 873, as amended Act 1893, c. 722, permitting a physical examination.

other hand it has been intimated that it was improper to exclude the physician's testimony where the plaintiff, the patient, did not object to its admission.[1]

In Missouri, it has been said that the physician should be told that he is not at liberty to testify as to privileged information.[2] But where no inquiry as to the competency or incompetency of the witness is made, and it does not appear whether or not the testimony is of the privileged sort, it is error to exclude it.[3]

In New York it has been held that where a person voluntarily in an action exhibits an injured part as evidence, the adverse party is entitled to follow it up by a personal or professional inspection of the injured part.[4]

In New York, in an early case in chancery, the chancellor said that a master was wrong in supposing there was legal evidence before him, where a physician had given evidence privileged under the statute;[5] but this decision was reversed on appeal, the Court of Errors saying that as no objection was made before the master by a party, the evidence was competent and legal.[6] This question seems to have been settled in New York by the decision in *Hoyt v. Hoyt*,[7] that the law does not prohibit the examination of a physician, but it prohibits the evidence being received in the face of objection, so that if no objection is made by a party it is not the province of the Court to reject the evidence.

Where it appears that privileged information was improperly admitted, it is not ground for reversal on appeal if it is apparent that the appellant was not injured by its reception.[8]

Where the Court is not empowered to reject the evidence of its own motion, the objection upon which it can reject is the objection of a party to the suit, and doubtless of the patient,

[1] Lincoln *v.* City of Detroit, 101 Mich., 245 (1894).

[2] Linz *v.* Mass. Mut. L. I. Co., 8 Mo. App., 363.

[3] Bowles *v* Kansas City, 51 Mo. App., 416 (1892).

[4] Winner *v.* Lathrop, 67 Hun, 511.

[5] Johnson *v.* Johnson, 4 Paige, 460 (Chancery, 1834); see also Hanford *v.* Hanford, 3 Edw. Ch., 468 (Vice-Chan., 1841).

[6] 14 Wend., 636 (Ct. of Errors, 1835).

[7] 112 N. Y., 493.

[8] Edington *v.* Ætna L. I. Co., 17 W. D., 1883 (N. Y. Supr. Ct., Gen. T.); Hoyt *v.* Hoyt, 9 N. Y. St. Rep., 731 (Supr. Ct., Gen. T.), affirmed 112 N. Y., 493.

but not of the physician.[1] But because of the privilege, it has been held that a physician will not be ordered to turn over his books of account to a receiver appointed in proceedings supplementary to an execution on a judgment against him.[2] Nor will examination of his books of account before trial be compelled.[3]

It is the province of the courts, however, to enforce the law and not to legislate by grafting exceptions upon it,[4] nor to extend it to cases which it does not cover.[5] They have refused therefore to except, by judicial decision, from the operation of the law criminal proceedings, testamentary causes, evidence of crime in civil actions, cases of lunacy and habitual drunkenness and fraud,[6] in all of which it was urged in argument without effect that the administration of justice was impeded by the privilege; they have also refused to except infants from the protection of the law[7] and to include information which was not within that indicated by the restrictive statutes;[8] but where the spirit of the law was violated by an enforcement of its letter and the privilege made a cloak to shield the murderer of the patient, or to tend to secure the conviction of an innocent person accused of the murder of the patient, it was held to be inapplicable.[9] The courts have also refused by mere judicial decision to limit the privilege to the life of the patient.[10]

THE EFFECT OF ENFORCING THE PRIVILEGE.

The courts are not warranted in admitting incompetent evidence in order to prevent the failure of justice by the exclusion of the privileged testimony.[11] It has been said that competent

[1] Johnson *v.* Johnson, 14 Wend., 636; Babcock *v.* People, 15 Hun, 347; Valensin *v.* Valensin, 14 Pac. Rep., 87 (Supr. Ct. Cal., 1887); s. c. 73 Cal., 106. See *infra*, p. 167, n. 3.

[2] Kelly *v.* Levy, 8 N. Y. Supp., 849 (G. T. N. Y. City Ct., 1890).

[3] Mott *v.* Consumers' Ice Co., 2 Abb. N. C., 143 (N. Y. Com. Pl., Sp. T., 1877); Lowenthal *v.* Leonard, 20 App. Div., 330 (1897).

[4] Edington *v.* Mut. L. I. Co., 5 Hun, 1; Renihan *v.* Dennin, 103 N. Y., 573; Record *v.* Village of Saratoga Springs, 46 Hun, 448; Loder *v.* Whelpley, 111 N. Y., 239.

[5] Will of Bruendl, 102 Wis., 45 (1899).

[6] *Supra*, p. 107 *et seq.*

[7] *Supra*, p. 113.

[8] Will of Bruendl, 102 Wis., 45 (1899). See also *supra*, p. 136 *et seq.*

[9] *Supra*, p. 108 *et seq.* See State *v.* Height (Iowa), 91 N. W. R., 935, saying in any event privilege not available to defeat punishment for crime; but this is not the rule generally in other States. See *supra*, p. 107.

[10] *Supra*, p. 110; see *infra*, p. 169, *et seq.*

[11] But see Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. R., 258 (1899), where it was intimated that the necessities of a case may overcome the statute.

secondary evidence cannot arise from incompetent primary evidence.[1] A letter written by a physician is inadmissible as evidence of the privileged facts which it states;[2] and a certificate of the cause of death, required by law to be signed by the physician and filed, is not admissible to prove the cause of death in an action in which the physician cannot testify;[3] even though the death occurred more than twenty years previously, and a statute makes such certificates of that age presumptive evidence.[4] Nor are the contents of a physician's certificate furnished to an insurance company, with the proofs of claim, though the fact that it was furnished may be received as an admission by the plaintiff that the cause stated therein was the cause of death.[5]

The making of the objection does not raise a presumption against the person making it.[6] In Indiana it is said no inference of fact can arise from the assertion of the privilege, and therefore the failure to call a physician cannot be commented on to the jury[7] (intimating, however, that this may not be true in personal injury cases and the like when the party entitled to the privilege is the actor, and brings his suit to recover damages for the particular subject protected by the privilege). In Iowa it has been held that the patient should not be interrogated under oath as to whether or not he will waive his privilege, for the jury ought not to be prejudiced against him by any show of reluctance.[8] In Michigan, however, it has been held that a patient's failure to produce his physician as a witness is a legitimate fact for the jury to consider.[9] In Missouri where the patient had testified respecting personal injuries suffered

[1] Brackney *v.* Fogle, 156 Ind., 535 (1901).

[2] Grattan *v.* Nat. L. I. Co. of U. S., 15 Hun, 74.

[3] Buffalo L. T. & S. D. Co. *v.* Knights T. & M. M. Aid Assn., 126 N. Y., 450; Sovereign Camp of Woodmen *v.* Grandon, 89 N. W. R., 448. See N. Y. Law 1893, c. 661, s. 22, which makes a copy presumptive evidence; and Davis *v.* Supreme Lodge Knights of Honor, 35 App. Div., 354, 165 N. Y., 159; see *supra*, pp. 106, 135, to the effect that notwithstanding this and similar statutes the copy is not admissible where physicians' testimony would be privileged.

[4] Robinson *v.* Supreme Commandery, 38 Misc., 97 (N. Y. Trial Term, 1902), affd. 77 App. Div., 215, 79 N. Y. Supp. 13.

[5] Redmond *v.* Industrial Benefit Assn., 78 Hun, 104 (N. Y., 1894); affirmed 150 N. Y., 167.

[6] See *supra*, p. 117.

[7] Edington *v.* Ætna L. I. Co., 13 Hun, 543; see Grattan *v.* Nat. L. I. Co. of U. S., 15 Hun, 74.

[8] McConnell *v.* City of Osage, 45 N. W. Rep., 550, s. c. 80 Iowa, 293. See *supra*, p. 161.

[9] Cooley *v.* Foltz, 48 N. W. Rep., 176, s. c. 85 Mich., 47.

by her, it was said to be legitimate ground for comment to the jury that she had not called her attending physicians to corroborate her.[1]

THE CHARACTER AND WEIGHT OF THE EVIDENCE TO SUSTAIN THE OBJECTION.

Where the objection is made, the burden of proof to establish the grounds of privilege is upon the person objecting.[2]

In Missouri it has been said that presumably examinations and diagnoses are made for the purpose of treatment, and physicians are said to be *prima facie* incompetent to testify to knowledge whether acquired from conversations or observations;[3] but it was also held that the statement of the physician, that he cannot separate his impressions received in his relation of physician from those received at other times, is not in itself sufficient to justify the exclusion of his evidence; that the facts themselves must appear to the Court, and it might be developed on proper cross-examination that discrimination could be made.[4] And where no inquiry was instituted to ascertain whether the testimony of the physician was or was not of the privileged sort, it was held error to exclude it.[5]

But it would seem that because of the necessarily delicate nature of the inquiry, to avoid disclosing what the statute forbids, the burden is overcome with slight evidence, and inferences and presumptions are freely indulged in aid of the privilege; for instance, where the physician was not permitted to answer whether he did converse with his patient about an injury, or whether he made an examination with reference to it, it was urged that the objection was prematurely made; but it was held that the fact that the patient consulted a physician on the occasion to which the inquiry related, when considered with the nature of the question, justified the exclusion in the absence

[1] Evans *v.* Trenton, 112 Mo., 390 (1892).

[2] People *v.* Schuyler, 43 Hun, 88 (N. Y. Supr. Ct., Gen. T.), affirmed 106 N. Y., 298; Stowell *v.* American Co-operative Assn., 23 N. Y. St. Rep., 706 (N. Y. Supr. Ct., Gen. T.); Henry *v.* N. Y., L. E. & W. R. R. Co., 57 Hun, 76 (N. Y. Supr. Ct., Gen. T.); Edington *v.* Ætna L. I. Co., 77 N. Y., 564; People *v.* Koerner, 154 N. Y., 355 (1897); Griffiths *v.* Metr. St. Ry. Co., 171 N. Y., 103; Green *v.* same, 171 N. Y., 201; Gartside *v.* Conn. Mut. L. I. Co., 8 Mo. App., 592; James *v.* Kansas City, 85 Mo. App., 20 (1900).

[3] James *v.* Kansas City, *supra.*

[4] Gartside *v.* Conn. Mut. L. I. Co., 8 Mo. App., 592.

[5] Bowles *v.* Kansas City, 51 Mo. App., 416 (1892).

of other proof.[1] On the other hand, where the physician testified that the information was distinct from any treatment as physician, the exclusion of his evidence of such information was held error;[2] and it was said that the language of the New York cases that it is to be assumed from the relationship that the information would not have been imparted except for the purpose of aiding the physician in prescribing are confined to the assumption from the facts of those specific cases, and that the Court does not lay down a general rule, for the statute prescribes that.[2] But the physician may testify that he did attend his patient as physician;[3] and he may answer the question whether the information was necessary to enable him to act in his professional capacity;[4] for while his testimony on that point is not conclusive, and the Court uses its own judgment in reaching a determination, his testimony is competent evidence.[5] He may also testify that a person was ill and was his patient, that he attended as physician, and he can state when he attended and how many times.[6] He may also testify that he prescribed.[7] But the testimony of physicians that they treated a patient for a disease has been criticised in Wisconsin.[8]

It has been said that where the evidence justifies the conclusion that information regarding the patient is acquired while attending in a professional capacity, it is not essential to show by formal proof that the information was necessary.[9]

THE RIGHTS AND DUTIES OF THE PHYSICIAN WITH REFERENCE TO THE PRIVILEGE.

The privilege established by law is a rule of evidence, and not a regulation of a physician's general conduct outside of a

[1] Feeny *v.* Long Island R. R. Co., 116 N. Y., 375.

[2] Griffiths *v.* Metr. St. Ry., 171 N. Y., 106.

[3] Numirich *v.* Supr. Lodge K. & L. of H., 3 N. Y. Supp., 552 (Trial Term, City Ct. of N. Y., 1889); see also *supra*, p. 136 *et seq.*; Nelson *v.* Nederland Life Ins. Co., 81 N. W. Rep., 807 (Supr. Ct. of Iowa, 1900).

[4] Herrington *v.* Winn, 60 Hun, 235 (Supr. Ct., Gen. T., 1891).

[5] In matter of Halsey, 29 N. Y. St. Rep., 533 (N. Y. Surr., 1890); cf. Matter of Darragh, 52 Hun, 591.

[6] Patten *v.* United L. & A. Ins. Assn., 133 N. Y., 450.

[7] Nelson *v.* Nederland L. I. Co., 81 N. W. Rep., 807 (Supr. Ct. Iowa, 1900); see Ellis *v.* Baird, 67 N. E. R., 960 (1903), where evidence of this sort was held to justify asking a physician on cross-examination, "What ailed him?"

[8] McGowan *v.* Supr. Ct. Order of Foresters, 80 N. W. Rep., 603 (Supr. Ct. Wis., 1899).

[9] Brigham *v.* Gott, 3 N. Y. Supp., 518 (Supr. Ct., Gen. T., 1889); *supra*, p. 154 *et seq.*

proceeding in which rules of evidence are applicable.[1] The courts have, however, not hesitated to intimate that it is a physician's duty to observe the same secrecy in his general conduct and conversation.[2] And, if the physician testifies without objection, it is still, in one New York case, said to be legitimate ground for criticism to the jury that he violated professional confidence.[3]

The physician may testify as an expert on hypothetical questions submitted to him regarding facts which might be equally true of any other person than his patient, and excluding from his consideration privileged knowledge.[4] And he may also testify as to matters which came to his knowledge before or after or independent of his employment as physician,[5] or which were immaterial to his acting in a professional capacity, and as to which his patient could have had no reasonable ground for believing that they were necessarily disclosed in order that the physician might so act.[6] It is the patient's privilege and not the physician's;[7] and, therefore, the physician is not absolutely incompetent as a witness, and has no right to refuse to testify.[8] But where he is a party he may object and then he will not be forced to disclose his patient's confidence.[9] Where the patient waives the privilege the physician may be compelled to testify respecting the privileged matter.[10]

In Indiana it has been held that where the patient testifies

[1] Buffalo L. T. & S. D. Co. *v.* K. T. & Mass. Mut. Aid Assn., 126 N. Y., 450; Nelson *v.* Nederland Life Ins. Co., 81 N. W. Rep., 807 (Supr. Ct. of Iowa, 1900); Boyle *v.* N. W. Mut. Rel. Assn., 95 Wis., 312 (1897); Cramer *v.* Hurt, 154 Mo., 112, 55 S. W. R., 258 (1899).

[2] Harris *v.* Rupel, 14 Ind., 209; Nelson *v.* Nederland Life Ins. Co., *supra;* Sullings *v.* Shakespeare, 46 Mich., 408; Storrs *v.* Scougale, 48 Mich., 387; Buffalo, etc., Co. *v.* Knights T. & Mass. Mut. Aid Assn., 126 N. Y., 450; Boyle *v.* N. W. Mut. Rel. Assn., 95 Wis., 312 (1897).

[3] Loudoun *v.* 8th Ave. R. R. Co., 16 App. Div., 152 (1897); but cf. cases cited in note 6, p. 118, to the effect that he cannot refuse to testify.

[4] Coryell *v.* Stone, 62 Ind., 307; People *v.* Schuyler, 43 Hun, 88, affirmed 106 N. Y., 298, See *supra*, p. 139.

[5] *Supra*, p. 140.

[6] *Supra*, p. 154 *et seq.*

[7] Lincoln *v.* City of Detroit, 101 Mich., 245 (1894); Boyle *v.* N. W. Mut. Rel. Ass., 95 Wis., 312 (1897).

[8] Penn Mut. L. I. Co. *v.* Wiler, 100 Ind., 92; Valensin *v.* Valensin, 14 Pac. Rep., 87 (Supr. Ct. Cal., 1887), s. c. 73 Cal., 106; cf. *In re* Hannah, 11 N. Y. Rep., 807; but cf. Loudoun *v.* 8th Ave. R. R. Co., 16 App. Div. (N. Y.), 152; *supra*, pp. 118, 123.

[9] Mason *v.* Libbey, 2 Abb. N. C., 137; Mott *v.* Consumers' Ice Co., 2 Abb. N. C., 143.

[10] Zimmer *v.* Third Ave. R. R. Co., 36 App. Div., 265.

in an action against his physician for malpractice the physician is then at liberty to testify or to introduce any other witness to testify concerning the matters in controversy.[1]

In Michigan, a physician who was plaintiff in a libel suit was not permitted to insist upon the privilege to prevent the disclosure of his maltreatment of his patient or what other physicians had discovered with regard to it by visits to his patients.[2]

The measure of the physician's exemption and liability in testifying is the language of the statute, and not his idea of his duty to his patient or the patient's injunctions of confidence or secrecy.[3]

In Missouri, the statute has been held to give way before the rule, said to be transcendent and universal, that in all cases that evidence is good, than which the matter of the subject presumes none better to be obtainable; and it was held that where it was apparent that the necessities of justice demanded the testimony of the physician in his own defence, where he was sued, not by his patient, but by another (the husband of his patient) for malpractice, he was entitled, notwithstanding the statute, to testify as to conversations with his patient and his manner of treatment.[4]

In some of the States there are statutory provisions entitling physicians to sue for compensation for their professional services.[5] The statutes regarding privileged communications are to be construed together with these. There seems to be no reason why a physician's right of action for his services and medicines should not survive the prohibition of his evidence;[6] but he cannot as a witness in such an action testify regarding privileged matter;[7] and he cannot elicit confidential communi-

[1] Lane *v.* Boicourt, 27 N. E. Rep., 1111; see also Winner *v.* Lathrop, 67 Hun, 511 (N. Y. Supr. Ct., G. T.). See *supra*, p. 127.

[2] Scripps *v.* Foster, 41 Mich., 742.

[3] Grattan *v.* Metr. L. I. Co., 80 N. Y., 281.

[4] Cramer *v.* Hurt, 154 Mo., 112, 55 S. W. R., 258 (1899); but cf. Citizens St. Ry. Co. *v.* Shepherd, 65 N. E. R., 765 (Ind. App. 1902).

[5] See p. 177, this volume, for the medical laws of the several States and Territories; for history of physician's right of action for services, see Graham *v.* Gautier, 21 Tex., 117; see Wood *v.* Munson, 70 Hun, 468. In Georgia and Alabama a physician's books are evidence in such actions. Code Ala., 1896, s. 1,808; Code Ga., 1895, s. 5,182.

[6] See Forbes *v.* Kennedy, 76 Hun (N. Y.), 39 (1894); Van Allen *v.* Gordon, 83 Hun, 379 (1894); 22 Am. & Eng. Enc. of Law, 2d ed., p. 794.

[7] Van Allen *v.* Gordon, 83 Hun, 379 (1894); cf. 18 Am. & Eng. Enc. of Law, 1st ed., 438.

cations from other physicians who also attended the patient.[1] But he can prove the facts by other witnesses.[2] Or, in case the patient waives the privilege, by going into the privileged domain for his own evidence, the physician may then go into the same domain.[3]

THE RESULT OF THE LEGISLATION.

It is, as we have already seen,[4] due to considerations of public policy that the statutes changing the common-law rule have been enacted[5]; but they have not proved an unalloyed benefit, nor free from perplexity, and some of their features have brought about conditions which in some cases have embarrassed the administration of justice. The law in New York may be taken for illustration; it formerly cut off the safest means of ascertaining the mental condition and competency of a testator;[6] it now precludes a physician from disclosing the condition of his patient who is a lunatic or habitual drunkard,[7] though it be the most satisfactory evidence; it shuts out much testimony tending to show fraud in insurance cases;[8] it precludes a physician from stating the cause of his patient's death,[9] though there is no longer any lawful possibility of keeping the cause a secret, for the law makes it the duty of the physician to make, for filing with the local board of health, a certificate of the probable cause of the death of a patient;[10] and such certificates of death are now, in certain actions, presumptive evidence of the cause of death,[11] but not in actions where the evidence of the physician on

[1] McGillicuddy *v.* Farmers' L. & T. Co., 26 Misc., 55 (N. Y. Supr. Ct., Trial Term, 1899).

[2] Kendall *v.* Grey, 2 Hilt., 300.

[3] Hennessy *v.* Kelley, 30 Misc., 703 (N. Y., Oneida Co. Ct., 1900).

[4] *Supra*, pp. 91, 97.

[5] Kling *v.* City of Kansas, 27 Mo. App., 231; Pierson *v.* People, 79 N. Y., 424.

[6] *Supra*, p. 110. Matter of Coleman, 111 N. Y., 220.

[7] *Supra*, p. 111.

[8] *Supra*, p. 112.

[9] *Supra*, p. 141; Davis *v.* Supreme Lodge Knights of Honor, 35 App. Div., 354 (1898).

[10] Laws of N. Y., Act 1893, c. 661, secs. 23, 31. In New York physicians are also required to attest certificates of the fact of birth for registration (Act 1893, c. 661, secs. 22, 31), and to certify the existence of contagious and infectious diseases (*ib.*, s. 24). See Davis *v.* Supreme Lodge, *supra;* similar laws have been adopted in other States, *e.g.*, Pol. Code of California, s. 3,024; Code Civ. Pro., s. 1,920; *In re* O'Connor, 118 Cal., 69 (1897); Indiana Laws, 1899, c. 16; Minn. Laws, 1899, c. 337.

[11] N. Y. Law, 1893, c. 661, s. 22, which also makes certificates of birth, attested by an attending physician, and certificates of death stating the cause of death, presumptive evidence. Keefe *v.* Supreme Council, 37 App. Div., 276 (1899).

the same subject would be privileged.[1] It has been the subject of much adverse criticism,[2] but all such considerations are properly to be addressed to the legislature and not to the courts. The New York statute seems to be the most far-reaching in its exclusion, and though it has been the longest in existence, it was modified at the legislative sessions of 1891, 1892, 1893, 1899, and 1904, a fact which tends to show that there was sound reason for criticism. The Pennsylvania statute,[3] which is one of the most recent, limits the privileged testimony to what tends to blacken the character of the patient. The Act of Congress prescribing the law for the District of Columbia is also one of the most recent statutes; and it differs substantially from the type of the New York statute.[4]

The restrictive rule has its foundation in the sentiment that confidences reposed in a physician by his patient in the intimacy of medical consultation and treatment ought to be respected and not dragged from the recipient in the publicity of the witness stand.[5] But the laws have not confined themselves to confidential communications, nor preserved the confidences inviolate, so that they present paradoxical phases and inconsistencies. An ideal law, designed fully to protect the confidence, would prohibit the physician from disclosing at any time, except with the consent of his patient, any confidential information received from his patient in the course of attendance upon him, or any knowledge of a confidential nature which he had acquired in such attendance. Such a law would not confine the restriction to evidence in a court but would make the restriction universal; it would still, however, be attended with annoyances and embarrassments and obstructions to the administration of justice.

There seems no sound reason why a physician should be compelled under a penalty to file information respecting vital statistics, such as the facts of birth and death and the cause of death, in a public office, and should thereafter be prohibited from stating

[1] See *supra*, pp. 106, 135, 141.

[2] See suggestions on the policy of the New York law in Conn. Mut. L. I. Co. *v.* Union Tr. Co., 112 U. S., 250; Pearsall *v.* Elmer, 5 Redf., 181; and *contra*, Edington *v.* Mut. L I. Co., 5 Hun, 1.

[3] Laws Penna., 1895, c. 117.

[4] *Supra*, p. 95, n. 1; 96, 99, 100, 104.

[5] See Smart *v.* Kansas City, 91 Mo. App., 586 (1901); Citizens St. Ry. Co. *v.* Shepherd, 65 N. E. R., 765 (Ind. 1902).

precisely the same facts as a witness. In some States a burial cannot take place without a certificate from a physician of facts which he is forbidden to disclose as a witness. A consistent system of law would either make the physician's certificate *prima facie* evidence, or else it would permit him to disclose in every proper place what it compels him elsewhere to make public. The situation, however, is not free from difficulty, for any statement of a physician which is admissible to prove a fact ought in the administration of justice to be free for cross-examination, and free cross-examination calls for the fullest opportunity to learn what the physician knows in order to ascertain whether his mere conclusion stated in the death certificate is justified by the facts. It would seem that in a large majority of instances no violence would be done to sentiment and no actual confidence would be broken if a physician were permitted to testify as to the cause of the death of his patient and to disclose as the basis of his opinion all material facts respecting the actual physical or mental condition of the decedent which were the result of his observation, or which he learned from his patient or elsewhere (not hearsay), and which could be properly considered or which may have been considered by him in reaching his conclusion, unless the facts, or any of them upon which he bases his conclusion, or with respect to which he is called on to testify, were received by him in actual confidence expressly imposed upon him by his patient, and he first so testifies, or unless he testifies that the facts were learned by him in the course of his professional attendance upon his patient, and if disclosed by him they would tend to destroy or injure the patient's reputation or disgrace his memory. The physician might be advantageously made a competent witness, with the privilege of declining to testify respecting matters expressly confided under pledge of secrecy, or under the implied pledge of secrecy arising from matters tending to the disgrace of the patient. At present perfectly indifferent matters, as far as any true and substantial reason for secrecy exists, may be suppressed, to the promotion of rank injustice, in order that the letter of the law may be fulfilled.

First, then, a physician ought to be competent to testify as to the cause of his patient's death and to submit to full cross-examination upon that subject, unless he should claim a privi-

lege and first testify that he received his knowledge under express pledge of secrecy, or else that it would tend to substantially injure or disgrace the memory of his patient.

Similarly there are statutes requiring a physician to give information to public authorities respecting contagious diseases. There seems no sound reason why he should not be permitted to testify to the same facts under similar safeguards respecting the protection of the patient's actual confidences. No amount of desire for concealment on the part of his patient will justify the physician before the law in failing to report the existence of a contagious disease, when the law requires from him such a report, and what he is once compelled to disclose in the interest of public health he ought to be thereafter compelled to disclose in the interest of public justice.

Second, therefore, a physician should be permitted to testify respecting any matter of which he is compelled by law to make a report to public authorities, unless it should affirmatively appear from his own or other testimony that its disclosure would violate a confidence expressly imposed or that it would tend to injure or disgrace his patient otherwise than by the mere disclosure of what he has already revealed in his public report.

This might seem to some to curtail too greatly the benefits of the privilege, but the medical man stands in a peculiar position before the law; he alone, of all the classes of witnesses to whom confidential communications are privileged (husband and wife, attorney, physician, and priest), has the legal duty of disclosure. The laws of vital statistics compel him to speak to all the world regardless of the feelings of his patient, and the laws of evidence compel him to keep silent on the same subject after the facts within his knowledge are an open secret from his own lips. No attempt has been made by legislation to reconcile the two sets of laws (we are not speaking of provisions for waiver), except in Pennsylvania, where the privileged matter is limited *to that which shall tend to blacken the character of the patient*, and in California where a physician is permitted to testify as to *the cause of death of his patient* in certain cases.[1]

The previous pages illustrate how the law has been occasionally used to defeat the ends of justice without really pro-

[1] *Supra*, p. 103.

tecting the confidences of the patient. The laws of Oklahoma and Kansas attempt to minimize this by limiting the privilege to a communication with respect to a physical or supposed physical disease.[1]

The inconveniences of the laws are illustrated by those cases in which a physician has not been permitted to testify to matters which were observable by all, and therefore not to express an opinion upon those matters within his own knowledge which were equally within the knowledge of others, who were not competent to express an opinion. This disqualification has extended to a refusal to permit a physician to testify that his patient had a broken leg, though the physician set it necessarily to the knowledge of others, so that the fact could not be a secret. An extreme illustration is the New York case, in which a physician was prevented from testifying, though he had publicly exhibited his patient with his consent and lectured on his ailment and published a descriptive article.[2] Such a rule has the effect of removing the most satisfactory professional testimony from the field of testimony legally competent without any corresponding advantage of secrecy to the patient. The privilege frequently avails the patient pecuniarily by putting his adversary in litigation at a disadvantage, but without protecting the patient's secrets.[3] This rule has worked most unsatisfactorily where the mental incompetency of the patient was in question. Frequently the best interests of the patient would require the physician's testimony, but he is disqualified as a witness because his patient is incompetent to waive the privilege. This has been met in Hawaii by excepting cases in which the insanity of the patient is the matter in dispute.[4] In New York the imposition of secrecy was most absolutely interpreted until the legislature finally permitted the waiver after death by certain interested parties, "except *confidential communications and such facts as would tend to disgrace the memory of the patient.*"[5] These amendments are a step toward a liberalizing movement in the laws, to accord with justice and reason and at the same time to pay due regard to a sentiment of privacy. There seems no sound reason why

[1] See *supra*, pp. 102, 154, n. 10.
[2] Scher *v.* Metr. St. Ry. Co., 71 App. Div., 28 (1902).
[3] See Cramer *v.* Hurt, 154 Mo., 112; *supra*, p. 121, *et seq.*
[4] See *supra*, p. 111.
[5] See *supra*, p. 121.

the personal rights of the living could not be equally protected by limiting the privilege to what is deemed a sufficient protection to the dead. Of course it might be said that the living can waive his entire privilege, but from the sentimental standpoint there is no substantial ground why an option which a patient might have refused to exercise while living should be exercised for him after death by one having a remote interest in his property, perhaps a distant and disinherited heir of a competent testator, against the unanimous wishes of all other relatives, representatives, and claimants of his property. Yet the pendulum has swung that way in New York. It seems to point ultimately to a sound law which will protect at all times "confidential communications and such facts as would tend to disgrace the patient." It might be said that this affords no criterion, and is therefore objectionable, because the facts must either first be elicited to determine whether they fall within the privilege or else that the physician must be made the judge. Such an objection would lie, however, just as well to the present law, which affords no criterion other than its own words, and it would not increase the perplexity to limit the privilege by the same standard before, as after, the death of the patient. And, too, the same indefiniteness exists in those constitutional guaranties which protect a witness from testifying as to matters which would tend to incriminate him. The same rules which have been enforced in the application of the constitutional protection could readily be applied in the administration of such a law.

Further, then, a liberalizing of the law of evidence by limiting the privilege in all cases to matter communicated in express confidence, or tending to disgrace the patient, might with profit to the proper and just administration of the law be adopted, without an unreasonable disregard of the delicacy of the relation of physician and patient.

What the State, out of a regard for public policy, will not enforce in its courts it ought not to permit its licensees to exact by coercion. It gives the right of waiver as an individual option to its citizens. It ought not to permit any body of citizens doing business by its express permission to exact the waiver from those entitled to the benefit of the privilege, as the price of being permitted to do business with the holders of the State's fran-

chise. Yet this is what insurance companies almost universally do. The business of insurance is generally regulated by law, and only those who conform with the law are usually permitted to conduct the business. Yet applicants for policies of life insurance are frequently, if not almost universally, after voluntarily submitting to examination by the insurer's own physicians, required, as a condition precedent to the issuance of a policy, to sign a waiver of the privilege. It would seem that the same public policy which creates the privilege should protect it from wholesale and coercive destruction.

Therefore a waiver in an application for a policy of insurance, or in any other contract which is issued pursuant to a special franchise emanating from the State, ought to be void. The New York legislature has attempted to meet this situation by providing that the waiver must be made at the time of the trial; but that creates unnecessary embarrassments where the same question of public policy is not involved, and is like Herod's slaughter of the innocents. It would seem that a particular solution as suggested might be made.

In those States where the protection is extended only in civil causes, the protection is only partial, because what is secret in one court is open to the fullest investigation in another. After a fact is fully disclosed under oath, there seems no ground for compelling the same witness to remain quiet on the same subject in another tribunal.

Therefore where an actual criminal trial has demonstrated that the ban of secrecy should be removed, and it has been removed, the law should provide that thereafter the privilege should not extend to the same matter in any other court or tribunal.

The laws of some States, by limiting the privilege to a licensed or authorized or regular practitioner, cast the burden on a patient, if he would protect his confidences, of verifying the credentials of his medical adviser before communicating the facts of his case. That is an unnecessary hardship to the patient. Frequently he may not be in a position, through ignorance or necessity, to first conduct a legal or medical investigation into the standing of his adviser before consulting him for advice. The ends of the law would be secured if, while visiting a penalty upon the practitioner for practising without authority, it

protected the communication made to one, or knowledge obtained by one, consulted in the capacity of physician or surgeon by another, for medical or surgical treatment or advice.

The law also, in the most cases, limits the privilege to communications to or knowledge of a physician or surgeon. California has liberalized the privilege by including their assistants,[1] and Arkansas by including trained nurses,[2] and New York by including a professional or registered nurse.[3] It would seem that all of these amendments are in the right direction. The reasons will readily occur. But the training of the nurse ought scarcely to make any difference in the privilege, provided, if not a trained nurse, the nurse be assisting a physician or surgeon in the treatment of his patient.

These observations and suggestions are made in view of the unsettled condition of this branch of the law which is manifested by frequent amendments, and also in view of the very evident movement which is apparent from the recent medical laws of the several States and Territories when compared with the laws of the same States and Territories in the first edition of this work, toward uniform laws regulating the attitude of physicians and surgeons before the law.

[1] See *supra*, p. 101; *infra*, p. 680.
[2] See *supra*, p. 101.
[3] See *supra*, p. 101; *infra*, p. 698.

SYNOPSIS OF THE LAWS

REGULATING THE PRACTICE OF MEDICINE AND SURGERY IN THE UNITED STATES OF AMERICA, GREAT BRITAIN, AND BRITISH NORTH AMERICA.

FIRST EDITION

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SECOND EDITION

PREPARED FROM THE LATEST STATUTES, WITH ANNOTATIONS,

BY

CHARLES A. BOSTON.

SYNOPSIS OF THE STATUTES

WHICH REGULATE

THE PRACTICE OF MEDICINE AND SURGERY IN THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICA.

[NOTE.[1]—This synopsis is designed to contain especially those general provisions of the statutes which regulate the acquisition and exercise of the right to practise medicine and surgery.[2] It does not include special provisions concerning restricted localities. It is not intended to include provisions permitting physicians to practise pharmacy, dentistry, optometry, or other specially regulated professions; nor laws regulating apothecaries, chemists, druggists, dentists, and veterinary surgeons, or the sale or dispensing or prescribing or administration of intoxicating liquors, drugs, medicines, anæsthetics, and poisons; nor provisions for the organization and procedure or reports of boards of medical examiners, except so far as they regulate the requirements demanded from applicants for permission to practise; nor the length of terms of members of such boards; nor the method of filling or creating vacancies therein; nor the cause of removal of members of such boards; nor their compensation; nor the disposition of their receipts or funds; nor provisions with reference to the duties of clerks or registrars in the preparation and safe-keeping of records in their care and reports thereon; nor those defining the duties of members of boards, and punishing the misconduct of such members; nor those prescribing qualifications for appointment to the public

[1] References to pertinent decisions have been embodied in footnotes under the particular State or Territory where rendered; but the decisions in one State or Territory will illustrate similar provisions of the statutes of other States and Territories.

[2] There is a manifest tendency in recent legislation toward greater uniformity in the principal requirements, an elevation of standards, and a more detailed legal regulation of minor requirements. The law may be regarded as in a transition state; a comparison of this edition with the first edition of this work forcibly demonstrates this fact. On the whole, and during this transition, additional regulations are of frequent enactment.

medical service; nor former laws not now applicable to candidates;[1] nor regulations of the form of certificates or licenses, where the issuing of them is committed to some public functionary or body; nor provisions with reference to the powers and disabilities of local institutions to confer diplomas or degrees; nor with reference to medical students, except as candidates for admission to practice; nor with reference to the formation, regulation, and functions of medical societies; nor with reference to the duties of physicians respecting vital statistics or contagious diseases, or other particular duties of physicians after admission to practice; nor as expert witnesses; nor as examiners in lunacy; nor special privileges or exemptions conferred on practitioners of medicine or surgery; nor with reference to the use and disposition of dead bodies for purposes of experiment or instruction. Many of these subjects are regulated by law, but they are not within the scope of this article. In the synopsis words of the masculine gender are uniformly used except when the law by its terms distinguishes sex, in which case the distinction is indicated.]

Alabama.

Board of Examiners.—The board of censors of the Medical Association of the State of Alabama and the board of censors of the county medical societies in affiliation with the said association are boards of medical examiners (Code 1896, s. 3,260).[2]

Qualification.—Without a certificate of qualification from the board provided for in sec. 3,260, no person can lawfully practise medicine in any of its branches or departments as a profession or means of livelihood (*ib.*, s. 3,261).[3] The

[1] The notes do not include decisions under former laws if they are evidently inapplicable under the present law.

[2] This statute is constitutional, as an exercise of the police power (so held of former Code, ss. 1,296–1,307) Brooks *v.* State, 88 Ala., 122; (so held of Code, s. 3,261), Bragg *v.* State, 134 Ala., 165. On the constitutionality of laws of this class see note in 14 Lawyers' Reports Annotated at p. 581; see *contra*, State *v.* Biggs, 46 S. E. R., 401 (N. C.), *infra*, p. 405.

[3] This law does not apply to corporations; they can neither practise medicine nor comply with the requirements for obtaining a certificate; consequently it is no defence to an action by a medical institute for treatment and cure of a patient that neither it nor its managing officer has such certificate. Wellman *v.* Jones, 124 Ala., 580.

The requirements of this statute

standard of qualification, method or system, and subjects of examination are prescribed by the medical association of the State (*ib.*, s. 3,262, but see below, Law 1903, No. 63, which appears inconsistent in part with this).[1]

The board of medical examiners, on application, must examine an applicant for a certificate of qualification as a practitioner of medicine, and if he be found qualified, and of good moral character, must issue a certificate (*ib.*, s. 3,263).

EXAMINATION.—Any applicant for a certificate of qualification to treat diseases of human beings by any system of treatment whatsoever, shall, according to rules prescribed and standards established by the Medical Association of the State, be examined by one of the authorized boards of medical examiners of the State in chemistry, anatomy, physiology, the etiology, pathology, symptomatology, and diagnosis of diseases, obstetrics and obstetrical operations, gynecology, minor and major surgery, physical diagnosis, hygiene, and medical jurisprudence; if the applicant be found proficient in said branches, a certificate of qualification is issued to him, entitling him to treat any and all diseases of human beings in the State in any manner he may deem best (Act 1903, No. 63, s. 1).

When the applicant states in writing that he has neither studied nor proposes to practise major surgery, he is exempt from examination in major surgery; then if found proficient in the other branches named above (*i.e.*, Act 1903, No. 63, s. 1), a certificate of qualification is issued entitling him to treat all diseases of human beings in the State in such manner as he may deem best except by the practice of major surgery (*ib.*, s. 2).[1]

CERTIFICATE.—The certificate is a license throughout the State. It must be recorded in the office of the judge of probate of the county in which the person resides at the time of issue. Upon recording it, the judge must indorse a certificate of record and sign it and affix the seal of the court (Code 1896, s. 3,264).

apply to those practising osteopathy. Bragg *v.* State, 134 Ala., 165 (1901). Cf. *contra* State of Ohio *v.* Liffring, 61 Ohio St., 39, 46 L. R. A., *infra*, p. 428; State *v.* Herring (N. J.), 56 Atl. R., 670; *infra*, p. 379; Nelson *v.* State Board of Health, 22 Ky. Law R., 438, 50 L. R. A., 383, *infra*, p. 277.

Persons have been admitted to testify as expert witnesses who would not now be permitted to practise medicine. See Washington *v.* Cole, 6 Ala., 212; Tullis *v.* Kidd, 12 Ala., 648.

[1] Act 1903, No. 63, repeals all laws and parts of laws *in so far as they conflict* with its provisions.

Such certificate, with the record thereof certified by the judge of probate, or, if lost, a certified copy of the record, is evidence (*ib.*, s. 3,265).

MIDWIFERY.—This law is not applicable to women practising midwifery (*ib.*, s. 3,267).

PENALTY.—A contract for the services of a physician or surgeon is void unless he has authority to practise;[1] proof of authority is not required at trial except on two days' notice before trial of suit for value of such services (*ib.*, s. 3,266).[2]

Practising medicine or surgery without a certificate is punishable with a fine of from $25 to $100[3] (Code 1896, s. 5,333).

FEES.—The statutory fees are as follows:

To judge of probate, for record of certificate, $1 (*ib.*, s. 3,264).

To board of medical examiners, for examination, actual expenses (*ib.*, s. 3,263).

ALASKA.

[N.B.—This law applies only to itinerant physicians.]

LICENSE.—Itinerant physicians are required to apply for and obtain a license to prosecute their business from a district court, or a subdivision thereof, within the district of Alaska, and pay for the license $50 per annum (Act of Congress, March

[1] See n. 3, p. 180, Wellman *v.* Jones; see for suit under former law where no recovery was allowed, Harrison *v.* Jones, 80 Ala., 412.

A diploma is not evidence of authority to practise, where the law requires other authority. Richardson *v.* Dorman's Ex'x, 28 Ala., 679.

If a person practising without a license sell drugs and medicines apart from his business as a physician, he may recover for them. Holland *v.* Adams, 21 Ala., 680.

This does not prevent a recovery in Alabama for services rendered elsewhere by an unlicensed physician; nor do the courts presume that other States have a similar statute (so held under former Code, s. 977). Downs *v.* Minchen, 30 Ala., 86. *Cf. contra,* Kan., p. 270, n. 2.

[2] The license is competent evidence without proof of the signatures attached to it (so held under former Code, s. 975). White *v.* Mastin (1861), 38 Ala., 147.

[3] A complaint (under a former Act, 1890–91, p. 857), which alleged that defendant practised medicine *without a license,* was held defective, in that the prohibition extends only to a person practising medicine without a *certificate of qualification.* Nelson *v.* State, 97 Ala., 79.

Under former Act (Code 1886, s. 4,078) a person who had procured a diploma from a regular medical college in Georgia and had it recorded, under a law permitting its record, was held not guilty of a misdemeanor (Brooks *v.* State, 88 Ala., 122; Stough *v.* State, 88 Ala., 234); but the provisions of the present act differ materially from those of the former law.

3d, 1899, s. 460, as amd. Act of Congress, June 6th, 1900, s. 29; Carter's Alaska Codes 1900, pt. iii., p. 141).[1]

Offence — Penalty.— Doing or attempting to do such business in violation of foregoing, or without having first paid the license fee, is a misdemeanor; punishment for first offence, fine, $50; second offence, $100; third offence, $150 and imprisonment thirty days to six months; each day of such violation or attempted violation is a separate and distinct offence (Act of Congress, March 3d, 1899, s. 461; Carter's Alaska Codes 1900, pt. ii., p. 122).

Issue of License.—Licenses to itinerant physicians are issued by the clerk of the district court, or any subdivision thereof, in compliance with an order of Court, or the judge thereof, duly made and entered (Act of Congress, March 3d, 1899, s. 463, as amd. Act of Congress, June 6th, 1900, s. 29; Carter's Alaska Codes 1900, pt. iii., p. 142).

Fees.—From applicant for license to itinerant physician, to clerk of court $5, and no other or additional compensation (*ib.*).

For license, $50 per annum (Act of Congress, March 3d, 1899, s. 460, as amd. Act of Congress, June 6th, 1900, s. 29; Carter's Alaska Codes 1900, pt. iii., p. 141).

Termination and Transfer of License.—No license is issued for longer than one year; no license can be transferred to another person except with the written consent of the court of issue, on application in writing (Act of Congress, March 3d, 1899, s. 467; Carter's Alaska Codes 1900, pt. ii., p. 124).

Offence After Obtaining License — Penalty.— For violating the act after obtaining a license, fine $50 to $200; and on every subsequent conviction during the year of issue twenty-five per cent in addition to the fine for the offence immediately preceding, and revocation of license; and in case of non-payment, imprisonment till paid, or for six months; after a second conviction, no license shall be granted (*ib.*, s. 473; Carter, p. 125).

Procedure.—Prosecution on information filed in district court or any subdivision, or before a United States commissioner, by the United States marshal or any deputy marshal,

[1] Sections 460, 461, 463 are constitutional; the license taxes are local taxes, not federal taxes; they are levied for the benefit of the Territory, not of the nation. Binns *v.* U. S., 194 U. S., 486.

or by the district attorney or by any of his assistants; or by indictment of grand jury (*ib.*, s. 474; Carter, p. 125).

Restriction.—The law as published restricts the grant of licenses for a business to be conducted within four hundred feet of a public schoolhouse, private school, or house of religious worship [but this probably applies only to liquor licenses, though the language would apply to all licenses under the act], (*ib.*, s. 475; Carter, p. 126).

Renewal.—Applications for renewal must be made annually before November 1st, and the business may be continued till the granting or refusal of the license, and a proportionate sum is retained as a license fee (*ib.*, s. 476; Carter, p. 126).

Arizona.

Board of Medical Examiners is composed of five members of at least three years' consecutive actual practice of medicine in Arizona, resident three years in Arizona continuously, immediately preceding appointment, actually engaged in the practice of medicine at the time of their appointment and *bona-fide* citizens of the United States; three shall be of the regular school of medicine, one of the homœopathic school, and one of the eclectic school (Act 1903, No. 59, s. 3). They meet quarterly at Phœnix and at such other times as the board appoints (*ib.*).

Qualification.—It is unlawful for any person to practise medicine unless he have a license (Act 1903, No. 59, s. 1). No person shall receive a license unless he or she shall have:

(1) Obtained a diploma to practise medicine, or some department thereof, regularly issued by a medical college, lawfully organized under the laws of the State or Territory where such college was located at time of issue of diploma; or

(2) Obtained a certificate entitling him or her to practise medicine under par. 3,529 R. S. Arizona 1901, or passed an examination prescribed under the Act of March 18th, 1897; or

(3) Practised medicine in the Territory continuously for five successive years preceding March 19th, 1903; or

(4) On examination by the board of medical examiners, shown to its satisfaction that he or she possesses sufficient knowledge and skill properly to practise medicine; and

(5) Become a *bona fide* resident of Arizona, over twenty-one years old, and of good moral character (*ib.*, s. 2).

APPLICATION.—A person desiring a license makes application to the board in writing, stating name, age, residence, name and location of college whence his diploma issued, length of time (if at all) he has practised medicine, giving specifically the places where and dates between which he has practised at each place, and the particular school and department of medicine he practised, and such other information as may be prescribed by the rules and regulations of the board; each application must be verified by oath of applicant before some officer authorized by the territorial laws to administer oaths, and accompanied by the diploma of applicant or a copy authenticated to the satisfaction of the board, and the affidavits of three or more residents of the county and State where the applicant formerly resided and practised medicine, stating within their own knowledge the name of the applicant, the length of time they have known him or her, his or her residence, length of time he or she has resided there, and if applicant has practised medicine in Arizona, the length of time and place or places where he or she has so practised, and that applicant is of good moral character. If applicant has received certificate under R. S. 1901, par. 3,529, or has passed satisfactory examination under the Act of March 18th, 1897, or has practised medicine in the Territory continuously for five successive years next preceding March 19th, 1903, he or she must present with application proper and satisfactory evidence thereof (*ib.*, s. 4).

If applicant has no such certificate, has not passed such examination, and has not practised, as last above mentioned, no license shall issue till he or she show upon examination by the board to its satisfaction that applicant possesses sufficient knowledge and skill properly to practise medicine (*ib.*, s. 4).

EXAMINATION is to be made by board as soon after application as convenient, and after notice to applicant of time and place, under reasonable rules and regulations prescribed by the board to ascertain fitness of applicant to practise medicine in the Territory. The applicant has the privilege, if he or she request it, of being examined in the branches of the science and practice of medicine other than physiology, anatomy, pathology, chemistry, practice, surgery, obstetrics, and gyne-

cology, by the member or members of the board, of any particular school of medicine specified in his or her diploma, and if the examination in such other branches be satisfactory to the member or members conducting the examination, it shall be approved by the board, and to the extent thereof be deemed satisfactory (*ib.*, s. 5).

LICENSE—REVOCATION.—License issues when board is satisfied applicant possesses qualifications prescribed by this act and has complied with this act (*ib.*, s. 6).

It must be revoked and cancelled on proper proof to the board that the holder, since its issuance, has been guilty of any grossly immoral or unprofessional conduct or other conduct rendering him or her unfit to practise medicine in the Territory, or has been convicted of felony; but only after due notice and full opportunity to defend or refute the charges (*ib.*, s. 7).

It is unlawful for a person whose license has been revoked and cancelled to practise medicine in the Territory until again licensed under the act (*ib.*, s. 7).

DEFINITION—EXCEPTION.—A person is regarded as practising medicine who:

(*a*) By advertisement or notice, sign or other indication, or by statement printed, written or oral, in public or private, made, done, or procured by himself or herself, or any other at his or her request, for him or her, claims, announces, makes known, or pretends his or her ability and willingness to diagnosticate or prognosticate any human diseases, ills, deformities, defects, wounds or injuries; or

(*b*) So advertises, or makes known, or claims his or her ability and willingness to prescribe or administer any drug, medicine, treatment, method or practice, or perform any operation or manipulation, or apply any apparatus or appliance for cure, amelioration, correction, reduction, or modification of any human disease, ills, deformity, defect, wound, or injury, for hire, fee, compensation, or reward, promised, offered, expected, received, or accepted, directly or indirectly; or

(*c*) In the Territory diagnosticates or prognosticates any human diseases, ills, deformities, defects, wounds, or injuries, for hire, fee, reward, or compensation, promised, offered, or expected, received or accepted, directly or indirectly; or

(*d*) In the Territory prescribes or administers any drug, medical treatment, method or practice, or performs any operation or manipulation, or applies any apparatus or appliance for the cure, alleviation, amelioration, correction, reduction, or modification of any human disease, ill, deformity, defect, wound, or injury, for hire, fee, compensation, reward, promised, offered, expected or received, directly or indirectly; or

(*e*) Acts as the agent of any person, firm or corporation, in the practice of medicine as hereinbefore set forth;

EXCEPT (*f*) in the advertisement or practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians or venders of dental or surgical instruments, apparatus or appliances (*ib.*, s. 10).

FORMER PRACTITIONERS were granted till June 1st, 1903, to file their applications and procure licenses (*ib.*, s. 14).

PENALTY.—Fine of from $100 to $1,000, or imprisonment in county jail three months, to one year, or both fine and imprisonment (*ib.*, s. 12).

FEES.—To the secretary of board of examiners with application, $2 (*ib.*, s. 4); and before examination, $10 more (*ib.*, s. 5).

ARKANSAS.[1]

MEDICAL EXAMINERS.—There are three boards of medical examiners—consisting of seven members each—one composed of physicians and surgeons recommended by the Homœopathic Medical Society of Arkansas, another of physicians and surgeons recommended by the Arkansas State Eclectic Medical Society, and the third of physicians and surgeons recommended by the Arkansas Medical Society, each appointed by the governor from a list presented by the respective societies (Act 22 of 1903, s. 1). No member is eligible for more than two terms in succession, nor is any member, professor, or teacher in a medical college or school or university, having a medical department, eligible for membership of a board (*ib.*, s. 2). The boards hold stated meetings on the second Tuesday in

[1] This legislation [so held of a former law] is valid exercise of police power. Richardson *v.* State, 47 Ark., 563. See also on constitutionality of analogous law regulating practice of dentistry Gosnell *v.* State, 52 Ark., 228.

January, April, July, and October each year, at places fixed by a majority, consulting the convenience of the boards and applicants for examination and certificates. Special meetings may be held on call of the president when deemed necessary or expedient. The boards keep a record of their proceedings with correct lists of applicants for license to practise medicine in any of its branches, with name, sex, color, age, nativity, time spent in study of medicine and, if possessing a diploma, name and locality of institution granting it, stating the system of medicine followed by each; the record states whether applicant was rejected or licensed; the record and a certificate under the seal of the board, signed by the president and secretary thereof, are *prima facie* evidence of all matters required to be kept therein, and, in any of the courts, of any matter appearing upon the records (*ib.*, s. 4). The boards are styled "Homœopathic State Medical Board," "Eclectic State Medical Board," and "State Medical Board of the Arkansas Medical Society." Those applicants who propose to practise the homœopathic system or the eclectic system are examined by the homœopathic board or the eclectic board respectively, and all others are examined by the board of the Arkansas Medical Society. The boards act separately and independently of each other, and the law respecting the duties of the board is construed as referring to each, acting separately and independently of the others (*ib.*, s. 5).

Former Practitioners.—The present law authorized the registration and issuance of a certificate to those practising medicine at the time of its passage, on conditions existing at the time, and to be complied with within ninety days from its passage. On failure to comply with these requirements, such person, before continuing practice, was required to make application and stand the examination required by the act (*ib.*, s. 6, 11). The act was in force from May 18th, 1903 (*ib.*, s. 16). By amendment, Act 98 of 1903, the above ninety days was measured from May 18th, 1903, the date when Act 22 took effect, instead of February 17th, 1903, the date of its passage.

Qualification.—Application for registration for the purpose of practising medicine and surgery, by a person residing in the State or coming into it, of the age of twenty-one years, not licensed to practise under previous laws, is made to the

secretary of the board, accompanied by a fee of $10 for examination and registration (*ib.*, s. 8).

If in the opinion of the board the applicant possesses the necessary qualifications, the board shall issue to him a certificate (*ib.*).

It is unlawful for any one to engage in the practice of medicine and surgery, or either, as a calling except as provided in the statute (Sandels and Hill, Digest Statutes of Arkansas, 1894, s. 4,962).[1]

A person desiring to engage in the practice of medicine or surgery must be of good moral character, twenty-one years of age, and a graduate of some reputable college of medicine and surgery that requires for graduation not less than two courses of lectures, each in a different year (*ib.*, s. 4,963).[1]

Record of Certificate.—Every person receiving a certificate from the board must have it recorded in the office of the county clerk where he practises or proposes to practise; when he moves to another county for the purpose of continuing practice, he must file for record a certified copy of his certificate with the county clerk of the county to which he moves (*ib.*, s. 9).

Temporary Permit.—To avoid delay and inconvenience any member of the board applied to, may grant an applicant a temporary permit to practise, on payment of the fee required of applicants, and after a satisfactory examination; the permit does not continue in force after the next regular meeting of the board, and is not granted within six months after the applicant has been refused a certificate by the board. No additional fee is charged to a person who has paid for a temporary permit (*ib.*, s. 10).

Examinations.—Examinations may be written or oral, at the discrimination of the board, of elementary and practical character, including anatomy, physiology, chemistry, materia medica, theory and practice of medicine, surgery, and obstetrics (Act 22 of 1903, s. 8).

[1] These clauses are parts of a former law; they are not expressly repealed by the Act of 1903, c. 22, which merely repeals "all laws or parts of laws in conflict with this act." Whether the courts will regard the entire former law as repealed thereby remains to be seen. The parts of the former law which are not necessarily in conflict with the present law are therefore published here, though probably repealed by the Act of 1903.

Definition.—Any person is regarded as practising medicine in any of its departments who appends M.D. or M.B. to his name, or repeatedly prescribes or directs for the use of any person or persons any drug or medicine,[1] or other agency, for the treatment, cure, or relief of any bodily injury, deformity, or disease (*ib.*, s. 13).

Exception.—Nothing in the act prevents a person from administering domestic remedies without compensation, and nothing in the act applies to the so-called midwife (*ib.*).

Offence.—Wilfully and knowingly making false statement to board concerning authority to practise medicine is perjury; indictable in county where affidavit is made, or county of residence (*ib.*, s. 7).

Practising or attempting to practise medicine in any of its branches, or performing or attempting to perform any surgical operation for any person, or upon any person, within the State without complying with the provisions of the act, is a misdemeanor (*ib.*, s. 11).[2]

Penalty.—A fine of from $25 to $500, or imprisonment in county jail ten days to ninety days, or both fine and imprisonment. Each day of practice is a separate offence (*ib.*, s. 11).

Itinerant Vendor.—An itinerant vendor of any drug, nostrum, ointment, or application of any kind intended for the treatment of disease or injury, or who may by writing, print, or other methods, profess to cure or treat diseases or deformity by any drug, nostrum, manipulation, or other expedient, and who has not obtained the certificate required for practitioners, is deemed to violate the law and is punished as provided (*ib.*, s. 12).

Fees.—To secretary of board, with application, for examination and registration, $10 (*ib.*, s. 8). To member of board

[1] The law does not treat liquor as a drug or medicine; if a doctor prescribes liquor for a patient, neither he nor a druggist can sell the liquor to fill the prescription unless he has paid the special tax required of liquor dealers under the U. S. internal revenue law. U. S. *v.* Stafford, 20 Fed. R., 720 (U. S. Dist. Ct. E. D. Ark.).

[2] Under a former law, an indictment charging defendant with practising medicine "without having filed with the county clerk a certificate of the county board of medical examiners, and without having a certificate of registration from any county clerk in the State," did not negative that defendant had in fact been duly registered as a physician, and was insufficient. State *v.* Fussell, 45 Ark., 65.

Osteopathy is not the practice of medicine. See below, p. 192, title, Osteopathy.

on application for temporary permit, $10; no additional fee from such applicant (*ib.*, s. 10). To the county clerk, for recording, $1.50 (Sandels and Hill, Digest, 1894, s. 4,964).[1]

For certificate of record the county clerk is not allowed to charge a fee (*ib.*, s. 4,964).[1]

Unlawful Advertising, Habitual Drunkenness, etc.—A physician, surgeon, or person engaged in the practice of medicine in the State, who for the purpose of procuring patients employs any solicitor, capper, or drummer, or subsidizes or employs any hotel or boarding-house, or advertises his business or remedies by untruthful or improbable statements made in his advertisements, circulars or cards, or obtains any fee or compensation by any assurance or promise that a manifestly incurable disease is curable, or wilfully betrays or exposes any professional secret learned by him from his patient or patron, to the detriment of such patient or patron, or becomes a habitual drunkard, and continues the practice of medicine and surgery while such habitual drunkard, or administers any medicine or performs any operation while drunk, is guilty of a misdemeanor (Act 178 of 1903, s. 1).

Penalty—Revocation of License.—For violation of s. 1 of Act 178 of 1903, fine $25 to $200, and revocation of license to practise medicine and surgery, to be adjudged and pronounced by the same court in which he is tried and convicted, and at the same time (*ib.*). Whenever a physician and surgeon or person engaged in the practice of medicine or surgery in the State is convicted of any crime and misdemeanor, involving moral turpitude, in addition to the other penalty or penalties imposed upon him, there shall be added a revocation of his license to practise medicine and surgery (*ib.*, s. 2).[1]

The license to practise is revoked on conviction of the crime of abortion, or of aiding or abetting therein (*ib.*, s. 3).

A physician and surgeon or person whose license is revoked under this act may appeal from the judgment of conviction, but pending the appeal shall not practise either medicine or surgery; if he so practises or attempts or offers to so practise pending the appeal, he is punished in the same manner and to the same extent as though he never had a license (*ib.*, s. 4).

[1] See note, p. 189.

New License.—After one year from the revocation of a license under this act, the physician or surgeon may appeal to the proper medical board for a new license, and may be relicensed if he shall satisfy the board that he is qualified, has reformed, and is worthy (*ib.*, s. 5).

Osteopathy—Board of Examiners.—The governor appoints a State board of osteopathic examiners, composed of five qualified resident practising osteopaths, each a graduate from a legally chartered school of osteopathy, where the course of study is not less than four terms of five months each (Act 173 of 1903, s. 1).

The board holds meetings for examinations at the State capital on the first Tuesday of February and July each year, and such other meetings as may be deemed necessary, each session not to exceed three days; and issues certificates of qualifications to all applicants who pass the required examination provided in sec. 3 (*ib.*, s. 2).

Osteopathy — Former Practitioners, Graduates.—All osteopaths practising in the State prior to the passage of the act and who have graduated from a reputable osteopathic school wherein the course of study covers twenty months or more, having four terms of five months each or more, shall be licensed to practise osteopathy by submitting to the board of osteopathic examiners such diploma and satisfying the board that he or she is the legal holder thereof, without examination, on payment of $10 (*ib.*, s. 2).

Osteopathy—Qualification.—Every person residing in the State not a graduate of a reputable osteopathic school as provided in s. 2, or any person coming into the State, of the age of twenty-one, making application to register for the purpose of practising osteopathy, must first make application to the secretary of the board, accompanied by a fee of $10, for examination and registration before the board (*ib.*, s. 3).

Osteopathy—Examination.—The examination is written, elementary and of practical character, including anatomy, physiology, chemistry, symptomatology, physical diagnosis, toxicology, urinalysis, theory and practice of osteopathy. If in the opinion of the board the applicant possesses the necessary qualification, the board shall issue to him a certificate (*ib.*, s. 3).

OSTEOPATHY — RECORDING CERTIFICATE — TEMPORARY PERMIT.— The provisions are substantially similar to the analogous provisions of the medical act above (except that they contain no provision that a temporary permit shall not be issued within a limited time after refusal of certificate by board) (*ib.*, s. 4).

OSTEOPATHY—OFFENCE.—Practising or attempting to practise osteopathy upon any person, or, by writing, printing, or other methods professing to cure or treat diseases or deformity osteopathically without compliance with the provisions of this act, is a misdemeanor (*ib.*, s. 5).

OSTEOPATHY—PENALTY.—Fine $25 to $500, or imprisonment in county jail ten to ninety days, or both fine and imprisonment; each day of practice, separate offence (*ib.*, s. 5).

OSTEOPATHY—DRUGS, SURGERY.—The certificate does not authorize the holder to prescribe or use drugs in the practice of osteopathy, or to perform major or operative surgery; but the act does not prohibit a legalized osteopath from using drugs and performing surgical operations after having obtained a license from a board of medical examiners authorized to issue such license (*ib.*, s. 6).

OSTEOPATHY—REVOCATION OF CERTIFICATE.—Any certificate issued by the board of osteopathic examiners may be revoked by it on satisfactory proof of fraud or misrepresentation in procuring it, or for any violation of the certificate, or any gross immorality by the holder (*ib.*, s. 7).

OSTEOPATHY—EXCEPTION.—The act does not prohibit any authorized practitioner of medicine or surgery in the State from curing or relieving disease with or without drugs, or by any manipulation by which any disease may be cured or alleviated (*ib.*, s. 8).

OSTEOPATHY—APPLICATION OF LAWS.—All laws, rules, or regulations to regulate reporting of contagious diseases, births or deaths, and to which the registered practitioner of medicine is subject, apply equally to the practitioner of osteopathy (*ib.*, s. 9).

OSTEOPATHY—NOT THE PRACTICE OF MEDICINE.—Osteopathy is not the practice of medicine or surgery within the meaning of the act to regulate the practice of medicine and surgery (Act 22 of 1903) (*ib.*, s. 10).

OSTEOPATHY—FEES.—Under s. 2, by former practitioners, $10 (*ib.*, s. 2).

Under s. 3, by applicants to the secretary of the board, for examination and registration, $10 (*ib.*, s. 3).

Under s. 4, for temporary permit, $10; no additional fee (*ib.*, s. 4).

CALIFORNIA.[1]

BOARD OF MEDICAL EXAMINERS.—The board of medical examiners of the State of California consists of nine members, five elected by the Medical Society of the State of California, two by the California State Homœopathic Medical Society, and two by the Eclectic Medical Society of the State of California.[2] It requires the affirmative vote of six members of the board to carry any motion or resolution, to adopt any rule, pass any measure, or authorize the issuance of any certificate to practise medicine and surgery (Act 1901, c. 51, s. 1). Each member of the board must make oath that he is a graduate in medicine and a legally qualified practitioner of medicine in the State (*ib.*, s. 2).

The board holds its regular meetings in San Francisco on the first Tuesday of April, August, and December each year, for consideration of applications for certificates and the transaction of other business, with power of adjournment from time to time. But examinations of applicants for certificates may, in the discretion of the board, be conducted in any part of the State designated by the board, under the supervision of one member of the board, upon written questions previously pre-

[1] Deering's General Laws of California, amd. to 1903, title 297, Act 2,162, medicine; title 352, Act 2,602, osteopathy. This law is constitutional in its essential features. Ex parte Gerino, 77 Pac. R., 166 (June, 1904), Supr. Ct. of Cal.; see *infra*, note 1, p. 197, Appendix, p. 680.

[2] The societies named are thus constituted agents of the State, and are not the recipients of private rights or privileges; the board must discharge its duty for the benefit of the people, not for the promotion of the interests of any school of medicine or medical society; therefore the act does not grant unconstitutional class privileges to the societies named, nor violate constitutional provisions requiring uniform operation of laws, nor forbidding the passage of special or local laws granting any special or exclusive right, privilege, or immunity. It does not render the law unconstitutional, that the societies, it may be presumed, will choose persons who believe in the particular school of medicine which they respectively represent. The board, when appointed, must act equally for the benefit of all applicants, and impartially, regardless of the school of medicine. Ex parte Gerino, 77 Pac. R., 166.

pared by the board; and when the examination is concluded, the questions submitted, together with the answers, and any other evidence or affidavits used or produced at said examination, shall be signed by said examiner and immediately returned to the board, who shall act upon the application in the same manner as if the person appeared before the board. Notice of the meetings is given by publication in San Francisco, Sacramento, and Los Angeles. Special meetings may be held at the call of the president at such time and place as he directs. The board receives through its secretary applications for certificates (*ib.*, s. 3). The board may adopt rules necessary to enable it to carry into effect the provisions of the act (*ib.*, s. 4).

QUALIFICATION.—Every person before practising medicine or surgery or any of their departments must have the certificate provided for.[1] To procure a certificate he must produce satisfactory testimonials of good moral character, and a diploma issued by some legally chartered medical school, whose requirements at the time of granting the diploma shall have been in no particular less than those prescribed by the Association of American Medical Colleges for that year;[2] or he must produce satisfactory evidence of having possessed such diploma, or a license from some legally constituted institution which grants medical and surgical licenses only upon actual examination, or satisfactory evidence of having possessed such license; and he must accompany his diploma with an affidavit stating that the applicant is its lawful possessor, and the person therein named; that the diploma or license was procured in the regular course either of instruction or examination, without fraud or misrep-

[1] A physician is not entitled to recover for services rendered before he obtains the certificate; the certificate does not relate back to the time of the application; but after obtaining the certificate the physician may recover for the services rendered after that date to a patient whom he began to attend before obtaining it. Gardner *v.* Tatum, 81 Cal., 370. See Appendix, p. 680.

[2] The law does not require the identical course prescribed by the Association of American Medical Colleges nor the same course of study, nor the same text-books, nor the same length of attendance; it must be such as requires a degree of proficiency in the studies to prepare the applicant for practice, equal to what would ordinarily be produced by the Association's standard of requirements. If the Association be composed only of allopathic colleges, that does not make the law an unjust or arbitrary discrimination against other schools.

The legislature has the power to prescribe the standard as it has, and the standard selected does not invalidate this law. Ex parte Gerino, 77 Pac. R., 166. See Appendix, p. 680.

resentation of any kind. The affidavit may be taken before any person authorized to administer oaths, and must be attested under the hand and official seal of the officer, if he have a seal. In addition the board may hear such further evidence as in its discretion it may deem proper to hear as to any of the matters embraced in the affidavit, and if it appears from such evidence that the affidavit is untrue in any particular, or if it appears that the applicant is not of good moral character, the application must be rejected.

Examination.— In addition to the above requirements, each applicant for a certificate must be personally examined by the board as to his qualifications to practise medicine and surgery. The examination is conducted in the English language, wholly or partly in writing, and on anatomy, physiology, bacteriology, pathology, chemistry, and toxicology, surgery, obstetrics, materia medica and therapeutics, and theory and practice of medicine. When the applicant applies for examination in materia medica and therapeutics, and theory and practice of medicine, he must designate in what school of medicine he desires to practise, and only the member or members of the board who belong to that school participate in this part of the examination. Examinations are required to be practical in character, and designed to discover the applicant's fitness to practise medicine and surgery (*ib.*, s. 5).[1]

Examinations in each subject consist of not less than ten questions, and answers are marked on a scale of one to ten. If an applicant fail in his first examination, he may, after six months, be re-examined; if he fail in his second examination, he shall not be entitled to another examination within a year thereafter, and shall be required to pay for such examinations the full fee. The examination papers form a part of the records of the board. In the examinations the applicant is known and designated by number only, and the name attached to the number is required to be kept secret by the secretary until after the board has finally voted on the application. The secretary in no instance shall participate in any examination, as an examiner, nor be entitled to vote on the question of granting any certificate to practise medicine and surgery (*ib.*, s. 5).

[1] See note 2, p. 195.

REGISTRATION WITHOUT EXAMINATION.—The board may in its discretion accept and register upon payment of the registration fee, and without examination of the applicant, any certificate issued to him by the medical examining board of the District of Columbia, or of any State or Territory of the United States, whose [*i.e.*, such board's] legal requirements at the time of issuing the certificate were in no degree or particular less than those of California when the certificate is presented, but only in case such foreign boards accept and register certificates granted by the California board, without examination of the holders.[1] Such applicants must pay to the secretary of the board $20 (*ib.*, s. 5).

CERTIFICATE.—When an applicant shows himself possessed of the qualifications, the board must issue to him a certificate authorizing him to practise medicine and surgery in the State (*ib.*, s. 6).

RECORD OF PROCEEDINGS OF BOARD.—A part of this record is a register of all applicants for certificate under this act, with the result of each application; and the record is evidence of all proceedings of the board set out therein (*ib.*, s. 7).

REGISTRATION.—Certificates must be recorded in the office of the clerk of the county of practice and the record indorsed thereon. A person changing his residence must record the certificate in the county to which he changes his residence (*ib.*, s. 8).[2]

The absence of such record is *prima facie* evidence of want of possession of a certificate (*ib.*, s. 8).[2]

OFFENCE—PENALTY.—A person holding a certificate who practises medicine or surgery, or attempts to practise medicine or surgery, without first filing his certificate with the county clerk, is guilty of a misdemeanor, punishable by fine of $25 to $100, or imprisonment in county jail thirty to sixty days, or both fine and imprisonment (*ib.*, s. 8).

COUNTY CLERK'S LIST OF RECORDED CERTIFICATES.—The county clerk keeps in a book a complete list of certificates recorded by him, open to public inspection (*ib.*, s. 9).

[1] If this provision were unconstitutional (which is not decided) as a grant of power to make arbitrary and unjust discrimination, that would not invalidate the whole law, and one held under charge of violating the law will not for such reason be discharged by writ of *habeas corpus*. Ex parte Gerino, 77 Pac. R., 166.

[2] See People *v.* Boo Doo Hong, *infra*, p. 199, note 1.

Refusal, Revocation of Certificates.—The board refuses certificates to individuals guilty of unprofessional conduct.[1] The applicant is given an opportunity to be heard, by citation, upon sworn complaint filed with the secretary, charging unprofessional conduct, and setting forth the particular acts constituting unprofessional conduct; the citation is returnable at the next regular session of the board following the expiration of thirty days from the filing of the complaint; the citation must notify applicant of time and place of hearing, the particular unprofessional conduct with which he is charged, and that he shall file his written answer under oath within twenty days after service of the citation, or default will be taken against him and his application for a certificate refused; the attendance of witnesses is compelled by subpœna issued by the secretary under seal of the board, which the secretary must issue on receiving a fee of twenty cents.

The method of service of the citation and subpœnas is that provided by the statutes of the State for the service of citations and subpœnas generally. The act provides for punishment of disobedience to subpœnas. Depositions may be taken, as in civil cases. If applicant fail to file his answer, under oath, within twenty days after service of citation, or such further time as the board may grant, and the charges be deemed on their face sufficient, the board must enter his default and refuse his application; if the charges be deemed sufficient and issue be joined by answer, the board proceeds to determine the matter and to hear evidence; if it appears to the satisfaction of the board that the applicant is guilty as charged, no certificate can be granted. No certificate is refused on ground of unprofessional conduct unless subsequent to passage of act, and within two years prior to application. If the holder of a certificate is guilty of unprofessional conduct, the certificate must be revoked by the board granting it; and the holder shall not thereafter be permitted to practise medicine or surgery, or any departments thereof, in the State; no revocation is valid without similar proceedings to the foregoing respecting refusal of certificate (*ib.*, s. 10).[2]

[1] See note 1, p. 197, *supra*. See also note 3, p. 239, *infra*.

[2] No penalty for practising after revocation. Ex Parte McNulty, 77 Cal., 164.

The accused, when he presents his answer for filing, must deposit his certificate with the secretary, and unless he do so his answer is not filed, and his default is entered and his certificate revoked if the board deem the charges on their face sufficient. When the certificate is revoked, if it has been deposited, the secretary must write across the face in red ink the fact of such revocation, and file the certificate in the archives of his office and certify the fact under seal of the board to the county clerk of the counties in which it is recorded, and the clerk must write in his register a note of the revocation (in the form prescribed). Such record of revocation by the county clerk is *prima facie* evidence of the fact thereof, and of the regularity of all proceedings of the board in the matter of revocation. If the board decide against revocation the certificate is returned to the holder. No certificate can be revoked for unprofessional conduct unless subsequent to the passage of the act, and within two years prior to filing the complaint. From the revocation the holder is disqualified from practising medicine or surgery in the State (*ib.*, s. 10).

Unprofessional Conduct.—(1) Procuring or aiding or abetting in procuring criminal abortion; (2) obtaining fee on assurance that manifestly incurable disease can be permanently cured; (3) wilfully betraying a professional secret; (4) all advertising medical business in which grossly improbable statements are made; (5) all advertising of medicines, or means, whereby monthly periods of women can be regulated, or menses re-established or suppressed; (6) conviction of any offence involving moral turpitude; (7) habitual intemperance (*ib.*, s. 10).

Legal Counsel.—The board has power to employ legal counsel (*ib.*, s. 11).

Offence.—Practising medicine or surgery without a valid, unrevoked certificate is a misdemeanor (*ib.*, s. 12).[1, 2]

[1] It is not necessary in an information to allege the existence of the medical societies; it is sufficient to charge the crime of wilfully and unlawfully practising medicine in the State of California without having first procured the certificate so to practise as required by law from some one of the medical societies named in the statute. People *v.* Boo Doo Hong, 122 Cal., 606; see also People *v.* O'Leary, 77 Cal., 30.

Upon evidence of the practice, the burden is on the defendant to prove that he had the required certificate, and in the absence of such proof it is taken as true that he had not procured such certificate. People *v.* Boo Doo Hong, 122 Cal., 606.

[2] See note 2, p. 198.

PENALTY.—The penalty for violation of the act is a fine of from $100 to $500, or imprisonment from 60 to 180 days, or both (*ib.*, s. 12); one-half of the fine to the prosecuting witness or witnesses, the other half to the school fund (*ib.*). Filing or attempting to file for record the certificate issued to another, or falsely claiming himself to be the person named in the certificate, or falsely claiming himself to be the person entitled to the same, is a felony, punishable the same as forgery (*ib.*, s. 13).

FALSE REPRESENTATION.—Assuming to act as member of board, or signing, subscribing, issuing, or causing to be issued, or sealing, or causing to be sealed, a certificate authorizing any person to practise medicine or surgery in the State, except the person so acting and doing shall have been elected a member of the board, is a misdemeanor, punishable with fine of $100 to $500, or imprisonment in county jail 60 to 180 days, or both fine and imprisonment (*ib.*, s. 14).

PREVIOUS REGISTRATION.—A person holding certificate from one of the boards of examiners under the act of April 3d, 1876, or the supplemental act which became a law April 1st, 1878, is entitled to practise medicine and surgery the same as if his certificate had been issued under this act; but such certificate is liable to be revoked for unprofessional conduct in the same manner and on the same grounds as if issued under this act (*ib.*, s. 15).[1]

DEFINITION.—The following are deemed as practising medicine or surgery: (1) Those who profess to be or hold themselves out as being engaged as doctors, physicians, or surgeons in the treatment of disease, injury, or deformity of human beings; (2) those who, for pecuniary or valuable consideration, prescribe medicine, magnetism, or electricity in the treatment of disease, injury, or deformity of human beings; (3) those who, for pecuniary or valuable consideration, employ surgical or medical means or appliances for the treatment of disease, injury, or de-

[1] FORMER PRACTITIONERS.—Holders of certificates theretofore granted by the board of examiners existing by the appointment of the California State Medical Society of Homœopathic Practitioners were excused by the Act 1877–78, c. 918, s. 7, from obtaining new certificates. The former acts were repealed by the present law, and, it might be contended, that this provision was thereby repealed; and that only those former practitioners who had *obtained certificates* under the repealed law are now entitled to practise without complying with the present law.

formity of human beings, except dealers in surgical, dental, and optical appliances; (4) those who, for a pecuniary or valuable consideration, prescribe or use any drug or medicine, appliance, or medical or surgical treatment, or perform any operation for the relief or cure of any bodily injury or disease (*ib.*, s. 16).

EVIDENCE.—The doing of any of the acts in this section mentioned shall be taken to be *prima facie* evidence of an intent, on the part of the person doing any of said acts, to represent himself as engaged in the practice of medicine or surgery, or both (*ib.*, s. 16).

EXCEPTION.—The act does not inhibit service in the case of emergency,[1] or the domestic administration of family remedies; nor apply to any commissioned medical officer in the United States army, navy, or marine hospital service, in the discharge of his professional duties; nor to any legally qualified dentist when engaged exclusively in the practice of dentistry; nor to any physician or surgeon from another State or Territory, when in actual consultation with a legal practitioner of this State, if such physician or surgeon is at the time of such consultation a legal practitioner of medicine or surgery in the State or Territory in which he resides; nor to any physician or surgeon residing on the border of a neighboring State, and duly authorized under the laws thereof to practise medicine or surgery therein, whose practice extends within the limits of this State, provided such practitioner do not open an office, or appoint a place to meet patients, or receive calls within the limits of this State (*ib.*, s. 16).

FEES.—To secretary of board from each applicant for a certificate, $20 (*ib.*, s. 5).[2] To secretary of board for subpœna for witness, 20 cents (*ib.*, s. 10).

OSTEOPATHY.—Any person practising osteopathy must possess the qualifications required by c. 99, Laws 1901 (Laws 1901, c. 99, s. 1).

OSTEOPATHY—BOARD OF EXAMINERS.—The Osteopathic Association of the State of California is required to appoint a

[1] An emergency is a case where the services of a qualified physician are not readily obtainable; not a case where a sick person has been given up as incurable, and in the latter case services, though gratuitous, are not within the exception. People *v.* Lee Wah, 71 Cal., 80.

[2] See *supra*, p. 196 (s. 5) for fees of those who fail in examination and are re-examined.

board of examiners known as the State Board of Osteopathic Examiners. It consists of five qualified practising resident osteopaths, each a graduate of a legally authorized college of osteopathy (*ib.*, s. 2). The board is required to hold meetings for examination at the State capitol, or at some regularly conducted and legally authorized college of osteopathy within the State, on the third Tuesday of February and July in each year, and such other meetings as may be deemed necessary, each session not to exceed three days, and shall issue a certificate of qualification to all applicants having a diploma, or who pass the required examinations under sec. 4 (*ib.*, s. 3).

Osteopathy—Certificate.—The certificate issued by the board is conclusive as to the rights of the lawful holder to practise osteopathy in the State (*ib.*, s. 3).

Osteopathy—Register.—The board is required to keep a record of all applicants for a license, with his or her name, age, time spent in study and practice of osteopathy, name and location of college of osteopathy from which applicant holds a diploma, and a register showing the names of all applicants licensed or rejected under this act (*ib.*, s. 3).

Osteopathy—Qualification.—It is unlawful to practise osteopathy in the State without a license from said board.

Persons practising osteopathy in the State prior to the passage of the act and holding a diploma from a legally authorized college of osteopathy of good repute, may be licensed to practise osteopathy in the State by submitting to the said board such a diploma, and satisfying the board that they are the legal holders thereof, or by undergoing an individual examination in anatomy, physiology, chemistry, histology, pathology, gynecology, obstetrics, and theory and practice of osteopathy, and such other branches as the board deem advisable.

All persons after August 1st, 1901, desiring to commence the practice of osteopathy in the State, must apply to the board for a license, and at the time and place designated by the board, or at a regular meeting, must submit a diploma from a legally incorporated college of osteopathy recognized by the board. Upon compliance with this act, the board shall grant a license to the applicant to practise osteopathy in the State, such license to be granted by consent of not less than three members of the board (*ib.*, s. 4).

OSTEOPATHY—DRUGS, ETC.—The certificate does not authorize the holder to prescribe or use drugs nor to perform major surgery (*ib.*, s. 5).

OSTEOPATHY—RECORD.—The person receiving a license must have it recorded in the office of the county clerk of the county in which he or she intends to practise, and the record shall be indorsed thereon. Upon removal to another county to practise, the holder must record his license in like manner in the county to which he or she removes (*ib.*, s. 6).

OSTEOPATHY — OFFENCE — PENALTY.—Practising osteopathy without a license, or contrary to the act, or for the purpose of obtaining license, falsely representing himself or herself to be the holder of a diploma as provided in the act, is misdemeanor, punishable by fine of $50 to $100, or imprisonment in county jail not more than ninety days, for each and every offence.

OSTEOPATHY—REVOCATION.—Any such certificate may be revoked by the board on satisfactory proof of fraud or misrepresentation in procuring it, or for any violation of the provisions of the certificate, or any gross immorality by the holder (*ib.*, s. 8).

OSTEOPATHY—NOT THE PRACTICE OF MEDICINE.—Osteopathy is not the practice of medicine or surgery under the act of 1876, or any of the acts amendatory thereof (*ib.*, s. 9).[1]

OSTEOPATHY—FEES.—For examination and license, in advance, to treasurer of board, not returnable, $10 (*ib.*, s. 4).

COLORADO.[2]

BOARD OF EXAMINERS.—The State board of medical examiners is composed of nine practising physicians of known ability and integrity, graduates of medical schools of undoubted respectability, six of the regular school, two of the homœo-

[1] The Act of 1876 and its amendments were repealed February 27th, 1901 (Act 1901, c. 51 *supra*); this osteopathy law became a law March 9th, 1901.

[2] This law is not an unconstitutional abridgment of the privileges and immunities of citizens of the United States nor of the several States. Harding *v.* People, 10 Col., 387, 391; 15 Pac. R., 727. It also is constitutional under the State constitution, as containing but one subject clearly expressed by its title (*ib.*). The power of the legislature to pass the law is unquestionable, as is the wisdom and necessity of this law (*ib.*). See Appendix, p. 680.

pathic, and one of the eclectic school or system, appointed by the governor (Mills' Annotated Statutes 1891, s. 3,547).[1]

QUALIFICATION.—Every person practising medicine must possess the required qualifications.[2] If a graduate in medicine, he must present his diploma to the State board of medical examiners for verification, or furnish other evidence conclusive of his being a graduate of a legally chartered medical school in good standing. The board issues its certificate,[3] and such diploma or evidence and certificate are conclusive.[4] If not a graduate of a legally chartered medical school in good standing, the person must present himself before the board for examination. All persons who have made the practice of medicine and surgery their profession or business continuously for ten years, and can furnish satisfactory evidence thereof to the State medical examiners, shall receive a license to continue (*ib.*, s. 3,550).[5]

Examinations of persons not graduates are made by the State board, wholly or partly in writing, in anatomy, physiology, chemistry, pathology, surgery, obstetrics, and practice of medicine (exclusive of materia medica and therapeutics) (*ib.*, s. 3,553). (See Appendix, p. 680 *et seq.*)

The holder of a certificate should have it recorded in the office of the clerk of the county in which he resides, and the record indorsed thereon, and on removing to another county to

[1] The method of appointment is constitutional—Brown *v.* People, 11 Col., 109–110, 17 Pac. R., 104; and there is nothing in the Constitution which requires the schools of medicine to be equally represented (*ib.*).

[2] The legislature intended to require all persons desiring to practise medicine or surgery within the State to apply for and receive a certificate of qualification from the State board before they should be authorized to do so. Harding *v.* People, 10 Col., 387, 392–3; 15 Pac. R., 727.

The law of privileged communications between patients and physicians, in this State, protects only information acquired by a physician or surgeon *duly authorized* to practise his profession under the *laws of this State*. The protection does not extend to information acquired by a physician not so authorized in this State. *It seems* that no other State has a law of privileged communications similarly restricted. Head Camp, Woodmen of the World *v.* Loeher, 17 Colo. App., 247 (1902), see *supra*, p. 116.

[3] Mandamus is the proper remedy for an arbitrary refusal of application for certificate. Harding *v.* People, 10 Col., 387, 394; 15 Pac. R., 727.

[4] Until he has procured the certificate he is without the requisite and only admissible evidence that he possesses the qualifications (*ib.*).

[5] A person who has received the certificate specified in s. 3,550 is entitled to practise and to recover for his services without showing that he has complied with s. 3,554. Riley *v.* Collins, 16 Col. App. 280; 64 Pac. R., 1,052.

practise should procure an indorsement to that effect on the certificate from the county clerk, and record this certificate in the county to which he removes (*ib.*, s. 3,554).[1,2] (Appendix, p. 680.)

The board may refuse certificates to persons convicted of conduct of criminal nature; and may revoke certificates for like cause (*ib.*, s. 3,356).[3,4] (See Appendix, p. 680.)

DEFINITION.—Professing publicly to be a physician and prescribing for the sick, or attaching to name "M. D.," or "surgeon" or "doctor" in a medical sense, is regarded as practising medicine. Gratuitous services in case of emergency are not prohibited (*ib.*, s. 3,557).[5] (See Appendix, p. 680.)

PENALTY.—The penalty for violation of the act[1] is a fine of from $50 to $300, or imprisonment in the county jail from ten days to thirty days, or fine and imprisonment for each offence; filing or attempting to file the diploma or certificate of another, or false or forged evidence, is a felony punishable the same as forgery (*ib.*, s. 3,558). (See Appendix, p. 680.)

SYSTEM OF MEDICINE.—Certificates are issued without prejudice, partiality, or discrimination as to schools or systems of practice or medicine, including the electropathic school (*ib.*, s. 3,561). (See Appendix, p. 680.)

FEES.—To treasurer of board, by graduates and practitioners of ten years' standing, $5; by candidates for examination, $10 (*ib.*, s. 3,552). (See Appendix, p. 680.)

To county clerk, for recording certificate, $1 (*ib.*, s. 3,554).

CONNECTICUT.[6]

EXAMINING COMMITTEES.—The State board of health appoints three examining committees, each of five physicians, nominated respectively by the Connecticut Medical Society, the Connecticut Homœopathic Medical Society, and the Connecticut

[1] See p. 204, n. 5.

[2] This was not intended to require him to record the certificate in every county into which he might be called to practise medicine; if mandatory at all, it is so only with respect to the county in which the physician resides. Riley *v.* Collins, 16 Colo. App., 280, 64 Pac. R., 1,052.

[3] See p. 204, n. 3.

[4] See Hawker *v.* N. Y., 170 U. S., 189, 18 Supr. Ct. R. 573, where revocation of right under N. Y. law, after conviction of felony, is held not unconstitutional as an *ex post facto* law, and all the similar statutes at the time (1897) are collated at p. 191 *et seq.*

[5] It is not necessary to negative this last clause, in an action for practising without a certificate. Brown *v.* People, 11 Col., 109, 110; 17 Pac. R., 104.

[6] See Appendix, p. 685.

Eclectic Medical Association,[1] and recommended by the said societies respectively as persons competent to serve upon the said examining committees (Act 1893, c. 158, ss. 6 and 7). One member of each of said committees is appointed annually (Gen. Statutes, 1902, s. 4,716).

Qualification, Exceptions.—No person shall for compensation, gain, or reward, received or expected, treat, operate, or prescribe for any injury, deformity, ailment, or disease, actual or imaginary, of another person, nor practise surgery or midwifery until he has obtained a certificate of registration, as in sec. 4,715 provided, and then only in the kind or branch of practice stated in the certificate, but the act does not apply to dentists practising dentistry only, nor to any person in the employ of the United Sates Government while acting in the scope of his employment, nor to medical or surgical assistance in cases of sudden emergency, nor to any person residing out of the State who shall be employed to come into the State to assist or consult with any physician or surgeon who has been registered in conformity with the chapter, nor to any physician or surgeon then actually residing out of the State who shall be employed to come into the State to treat, operate, or prescribe for any injury, deformity, ailment, or disease from which any person is suffering at the time when such non-resident physician or surgeon is so employed, nor to any actual resident of this State recommending by advertisement or otherwise the use of proprietary remedies sold under trade-marks issued by the United States Government, in so far and to such extent only as the use of such remedies is concerned; nor to any chiropodist or clairvoyant not using in his practice any drugs, medicines, or poison, nor to any person practising the massage method or Swedish movement cure, sun cure, mind cure, magnetic healing, or Christian Science; nor to any other person who does not use or prescribe in his treatment of mankind drugs, poisons, medicine, chemicals, or nostrums (Gen. Statutes, Conn., 1902, s. 4,714).

No person shall obtain a certificate of registration, as in s. 4,714 required, until he has passed a satisfactory examination before one of the examining committees appointed for the purpose by the State board of health, except as hereinafter pro-

[1] See p. 208, note 1.

vided, nor until he has filed with the State board of health duplicate certificates signed by a majority of said examining committee, stating that they have found him qualified to practise either medicine, surgery, or midwifery, nor until he has filed with said board duplicate statements subscribed and sworn to by him upon blanks furnished by said board, giving his name, age, and place of birth and present residence, stating of what medical college he is a graduate, and the date of graduation, together with such other information as shall be required by said blanks (*ib.*, s. 4,715, as amd. 1903, c. 71). No person shall be eligible to said examination until he presents to the committee, by whom he is to be examined, satisfactory evidence that he has received a diploma from some legally incorporated medical college.

Any one of the examining committees under s. 4,716 may accept the license of any state board of medical examiners of any State in the United States or in the District of Columbia in lieu of said examination, provided the applicant present such license to the examining committee before whom he appears, together with satisfactory evidence that such license has been issued after a state examination of as high a grade and of the same kind as that required by said examining committee, that he is a resident of this State, or intends in good faith to permanently reside herein, has been in actual practice at least six months in the year immediately preceding his application, and is of good moral character and professional standing. And, upon payment to said committee of $15, he may receive a certificate of approval of such license by said examining committee (Gen. Stats., 1902, s. 4,715, as amd. 1903, c. 71, s. 1). Any person passing such examination or obtaining such certificate of approval and filing said certificates and statements shall receive from said State board of health, upon payment of $2, a certificate of registration stating that the person named has been found qualified to so practise (*ib.*).

Applicants for certificates to practise medicine or surgery shall be examined in anatomy, physiology, medical chemistry, obstetrics, hygiene, surgery, pathology, diagnosis, and therapeutics, including practice and materia medica. Each committee shall frame its own questions and conduct its examinations in writing, and both questions and answers shall be filed

with the State board of health. Each applicant may choose by which of the committees he will be examined.[1]

After rejection by any examining committee, the applicant shall not be eligible to examination by either of the other committees until after the expiration of twelve months, but may be re-examined by the same committee at any subsequent meeting (*ib.*, s. 4,718, as amd. 1903, c. 71, s. 2).

On the receipt of duplicate statements, the board shall transmit one of them with a duplicate of the certificate of registration to the town clerk of the town where the person filing the statement resides, and if he does not reside in the State to the town clerk of the town in the State nearest to his place of residence, and said clerk shall record the same and return them to the person who filed them with the board (*ib.*, s. 4,718, as amd. 1903, c. 71, s. 2).

The secretary of each medical society shall file with the secretary of the State board of health a list of medical colleges or institutions recognized as legal and reputable by his society or all of such secretaries may agree upon a single list, and such list may be corrected as may be necessary (*ib.*).

Midwifery—Interpreter.—Every examining committee, when requested for a certificate permitting the applicant to practise midwifery, shall, if the applicant does not understand English, conduct the examination through an interpreter of the language understood by the applicant. The interpreter is furnished and paid by the applicant, and must give to the committee conducting the examination satisfactory proof of his ability correctly to translate the applicant's language into English. When such applicant satisfactorily passes such examination, a certificate is issued as provided in s. 4,715 (Gen. Stats., 1902, s. 4,717).

Examinations are held by said examining committees on the second Tuesday of March, July, and November each year, at such places as they may designate, and at such other times and places as they shall determine.

[1] School of Practice.—The question of malpractice is to be determined by applying the rules and practice of the school of medicine to which the practitioner belongs and under which he practises; no question of the comparative merits of the different modes of practice, of different schools of medicine is to be considered by a jury in a malpractice case. Force *v.* Gregory, 63 Conn., 169.

EXCEPTIONS.—Nothing in the act repeals or affects any provisions of any private charter. It does not apply to licensed pharmacists (Gen. Stats., 1902, s. 4,719).

PRESCRIPTIONS.—All physicians or surgeons practising under this chapter (c. 274, Gen. Stats., 1902, ss. 4,714–4,720) must, when requested, write a duplicate of their prescriptions in English (*ib.*, s. 4,719).

PENALTY.—For violating s. 4,719 fine $10 for each offence. For violating any provision of s. 4,714 a fine of from $100 to $300 for the first offence, and for each subsequent offence a fine of from $200 to $500, or imprisonment in the county jail for from thirty to ninety days, or both, one-half paid to the person or corporation making the complaint, the other half to the State board of health (*ib.*); swearing falsely to a statement required by s. 4,715 is perjury (*ib.*).

FEES.—To the State board of health, on receiving certificate of registration, $2 (Gen. Stat., 1902, s. 4,715, as amd. 1903, c. 71, s. 1).

To examining committee, on receiving certificate of approval of license from other State or District of Columbia, $15 (*ib.*).

To examining committee before examination, $15; for examination in midwifery alone, $10 (Gen. Stats., 1902, 4,718, as amd. 1903, c. 71, s. 2).

To the town clerk, by State board of health out of the amount paid to it, for recording, 25 cents (*ib.*, s. 9).

OSTEOPATHY — EXAMINING BOARD — ITS RECORDS. — There is a State board of osteopathic registration and examination, of three members, appointed by the governor; the members are resident osteopathic physicians of good standing in their profession, graduates of legally chartered colleges of osteopathy. Copies of the record of the board's proceedings, certified by its recorder, are legal evidence. The board must meet at the capital on the first Tuesdays of March and September each year, and at such other times as a majority shall appoint; a majority constitutes a quorum; the board must make such rules of procedure for the regulation of all matters of application and hearing before it as it may deem advisable (Gen. Stats., 1902, s. 4,737).

OSTEOPATHY—QUALIFICATION.—No person shall engage in the practice of osteopathy unless first licensed therefor by the

board. Applications for license must be in writing, signed by the applicant on blanks furnished by the board, setting forth such facts concerning the applicant as the board shall require. No license shall be granted to an applicant unless he has received a certificate of graduation from some reputable college of osteopathy, duly recognized by the laws of the State where it is situated, or unless he has spent as pupil or assistant at least two years under the instruction and direction of some reputable practitioner of osteopathy, or unless actually engaged in the practice of osteopathy in this State on June 17th, 1901. Any person at said date actually engaged in the practice of osteopathy in this State is entitled to a license on application as provided in this section and payment of a fee of $2. A person desiring to commence the practice of osteopathy in the State must make application to the board as provided in this section (*ib.*, s. 4,738).

Osteopathy—Examination.—On receipt of such application the board must require the applicant to submit to an examination as to his qualifications for such practice, which examination must include the subjects of anatomy, physiology, pathology, and the principles and practice of osteopathy. If such examination be passed to the satisfaction of the board, it must issue its license to the applicant (*ib.*).

Osteopathy—Practitioners in Other States.—A license may be granted without examination to any person who has been in active and continuous practice of osteopathy for three successive years in any other State, who shall satisfy the board as to his fitness to engage in such practice (*ib.*).

Osteopathy—Fees.—From practitioners in the State on June 17th, 1901, on application for license under s. 4,738, $2 (*ib.*, s. 4,738).

Except as otherwise provided in s. 4,738, from every applicant for license, at the time of his application, to the recorder, $25; of which $20 is returned to him in case he fail to obtain his license (*ib.*, s. 4,739).

Osteopathy—Refusal of License—Revocation.—The board must refuse to grant a license to a person guilty of a felony or addicted to any vice to such a degree as to render him unfit to practise osteopathy; and may, after notice and hearing, revoke the license of any person convicted of a felony (*ib.*).

OSTEOPATHY—LIMITATIONS.—The license does not authorize the holder to prescribe or use drugs in his practice, nor to perform surgical operations (*ib.*).

OSTEOPATHY — OTHER PROVISIONS. — Osteopathic physicians are subject to the rules and regulations governing other physicians in making and filing certificates of death, the control of contagious diseases, and other matters pertaining to public health (*ib.*).

OSTEOPATHY—PENALTY.—Every person engaging in the practice of osteopathy in violation of any provision of this section or of ss. 4,737 or 4,738 shall be fined not less than $25 nor more than $100 for each offence (*ib.*).

OSTEOPATHY—EXCEPTION.—Nothing in this section, or in s. 4,737 or s. 4,738, prohibits any legally authorized practitioner of medicine or surgery in this State from the practice of his profession (*ib.*).

DELAWARE.

MEDICAL COUNCIL.—Consists of the chief justice and of the presidents of the two State boards of medical examiners (Act 1895, c. 40, s. 1, vol. xx.). The council shall issue certificates for license to practise medicine or surgery to such applicants as have presented such diplomas as are required and have successfully passed the required examination (*ib.*, s. 5).

BOARDS OF MEDICAL EXAMINERS.—There are two separate boards representing respectively the president and fellows of the Medical Society of Delaware and the Homœopathic Medical Society of Delaware State and Peninsula;[1] each consists of five members chosen by the governor from lists of members submitted by the two societies, each board exclusively from members of the same society, each member to be a registered physician in good standing and to have practised under the laws of the State not less than five years (*ib.*, s. 6).

EXAMINATIONS.—Each board of medical examiners shall submit questions to the Medical Council for thorough exami-

[1] It is of historical interest that Act 1835, c. 319, permitted practice without a license and permitted such practitioners to receive gratuities, but not to sue for fees. Apparently this was aimed to permit *Thompsonian* physicians to practise without a license. (See brief of Cullen in Adams, Adm. *v.* Stewart, 5 Harr., 144—1849); and the Act of 1843, c. 496, permitted *homœopathic* physicians both to practise and sue for fees without a license (*ibid.*).

nations in anatomy, physiology, hygiene, chemistry, surgery, obstetrics, pathology, diagnosis, therapeutics, practice of medicine and materia medica. The Medical Council shall select the questions from the lists submitted by the board of the candidate's choosing. If there be candidates of another school than the two designated, they shall be examined by the council and some reputable practitioner in the State, of such school, by the council selected, upon questions selected from standard text-books on the above subjects as taught by the school selected by the candidate (*ib.*, s. 10). The examinations are in writing and embrace the subjects named in sec. 10. An official report is transmitted by the board to the council (*ib.*, s. 11). The council issues a certificate to successful candidates (*ib.*, s. 12).

Qualification — License. — A person not authorized to practise medicine and surgery prior to the passage of the Act of 1895 and desiring to practise, pays a fee of $10 to the secretary of the council, and presents to him a written application for examination with satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character, has obtained a competent common school education, and has received a diploma conferring the degree of medicine from some legally incorporated medical college. Applicants receiving their degree after the passage of this act must have pursued the study of medicine for at least four years, including three regular courses of lectures in different years, in some legally incorporated medical college or colleges prior to the granting of said diploma. The proof, if required, shall be on affidavit. The council then issues an order for examination before the board of examiners of the candidate's choice. In case of failure, a candidate, after six months and within two years, may have a second examination without further payment, before same board. If the application is withdrawn after six months and within two years, the fee of $10 is to be returned on demand (*ib.*, s. 13).

It is unlawful to practise medicine or surgery without a license (*ib.*, s. 14).[1]

[1] Under a former act (Act 1822) providing that no person (except certain former practitioners or practitioners of other States) should thereafter practise medicine or surgery and receive or demand fee or reward without having first obtained a license, it was held that a physician could not recover on his bill without first proving his license. Adams, Adm. *v.* Stewart, 5 Harr., 144 (1849).

The clerk of the peace of a county, on presentation of a certificate as provided in this act shall issue to the person presenting it, a license signed by the Governor and countersigned by the Secretary of State and sealed with the seal of his office, certifying that such person is authorized to practise medicine and surgery in this State conformably to the laws thereof. A similar license shall be similarly issued to a person qualified in one of the counties prior to the passage of this act (*ib.*, s. 15).

Applicants from Other States.—Applicants examined and licensed by, or who have been members of State examining and licensing boards of other States, upon the payment of $50 to the treasurer of the council, and on filing with the secretary of the council a copy of his or her license or certificate certified to by the affidavit of the president and secretary of such board, showing also that the standard of requirements of the said board at the time the said license or certificate was issued was substantially the same as that required by the Medical Council of Delaware, and his or her affidavit as to the personality thereof, may be granted a certificate for a license by the council on the recommendation of the boards of medical examiners without further examination (Act 1899, c. 241, vol. xxi.).

Refusal, Revocation.—The Medical Council may refuse to issue a certificate for a license or may revoke a certificate for a license, for chronic and persistent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure chronic incurable diseases, or where any person shall present to the council any diploma, license, or certificate that shall have been illegally obtained or that shall have been signed or issued unlawfully or under fraudulent representations. The accused is entitled to a copy of the complaint and a hearing before the council in person or by attorney (Act 1899, c. 241, vol. xxi.).

Exceptions.—The law does not apply to physicians, who are practitioners of another State, coming into the State in consultation with a lawful practitioner of medicine and surgery in this State (Act 1895, c. 40, s. 16), nor to dentists nor dental surgery (*ib.*, s. 18).

Offence.—The violation of this law is a misdemeanor (*ib.*, s. 17).

PENALTY.—A fine of from $100 to $500, or imprisonment not more than one year (*ib.*, s. 17).[1]

FEES.—To clerk of the peace, for issuing license to practise, $10.50 (Laws 1887, vol. 18, c. 35, s. 4). For issuing annual license for revenue of the State, $10.50 (Laws, vol. 13, c. 117, s. 1, 3, 6; as amended, vol. 14, c. 16; Act 1895, c. 40, s. 19, vol. xx.)

To secretary of medical council, from applicant for examination, $10 (Act 1895, c. 40, s. 13); to treasurer of medical council, from applicant from another State, without examination, under Act 1899, c. 241, s. 2, $50.

DISTRICT OF COLUMBIA.

BOARD OF MEDICAL SUPERVISORS.—Consists of the presidents of the three boards of medical examiners and two persons not physicians, one learned in the law; appointed by the commissioners of the District, not more than two members adherents of any one system of medical practice (Act of Congress 1896, c. 313; 29 U. S. Statutes-at-Large, p. 198).[2] The board supervises examinations and issues all licenses to practise medicine, surgery, or midwifery. The board's register shows all applicants for examination for licenses to practise medicine and surgery, the name, age, place, and duration of residence of each candidate, the time he or she has spent in medical study in or out of medical schools, and the names and locations of all medical schools which have granted said applicant any degree or certificate of attendance upon lectures in medicine, and whether applicant was rejected or licensed under this act (*ib.*, s. 2).

BOARDS OF MEDICAL EXAMINERS.—The commissioners of the District appoint three boards of medical examiners, viz.: (1) the board of medical examiners of the District of Columbia, composed of five physicians in good standing, adherents to the regular system of medical practice; (2) the board of homœopathic medical examiners of the District of Columbia, composed of five physicians in good standing, adherents to the homœo-

[1] See note, p. 212.

[2] This act was not repealed by the CODE OF LAW for the District of Columbia, enacted March 3d, 1901, as amd. by acts of Congress approved January 31st and June 30th, 1902. See sec. 1,636 of that code, sub. s. *Eighth.*

pathic system of medical practice, selected from not less than ten names submitted by the Washington Homœopathic Medical Society; (3) the board of eclectic medical examiners of the District of Columbia, composed of five physicians in good standing, adherents to the eclectic system of medical practice, selected from not less than ten names submitted by the Eclectic Medical Society of the District of Columbia. No member of either board shall have been engaged in the practice of medicine and surgery in the District of Columbia less than five years at the time of his appointment. In the event of the failure of nominations, the commissioners may nominate (*ib.*, s. 5).[1]

EXAMINATIONS.—The secretary of the board of medical supervisors shall mail to each applicant a notice of the time and place of examination not less than seven days before the examination, and at a longer period if requested at the time of making the application (*ib.*, s. 2). (See QUALIFICATION below.)

Each board holds an examination in Washington on the second Thursday in January, April, July, and October each year, continuing so long as necessary to examine all applicants, and other meetings at such times as the board of medical supervisors shall direct. Each board shall examine at the meeting immediately following receipt of the proper certificates from the board of medical supervisors, all applicants for licenses so certified (*ib.*, s. 6). The several boards of medical examiners, not less than one week prior to each examination, submit to the board of medical supervisors questions for thorough examinations in anatomy, physiology, chemistry, pathology, materia medica and therapeutics, hygiene, histology, practice of medicine, surgery, obstetrics and gynecology, diseases of the eye and the ear, medical jurisprudence, and such other branches as said board of medical supervisors may direct. The board of medical supervisors select the questions for each examination from these lists; such questions are the same for all candidates, except that in therapeutics, practice of medicine, and materia medica the questions are in harmony with the system of medicine selected by the candidate. The examinations are oral and written, and embrace the subjects in sec. 3 (below). The board of

[1] See p. 219, note 2.

medical examiners makes an official report stating the average attained by each candidate in each branch, the general average and the result of the examination, whether successful or unsuccessful, to the board of medical supervisors, embracing all examination papers, questions, and answers; all such examination papers are kept for reference and inspection for five years (*ib.*, s. 7).

QUALIFICATION.—All persons desiring to practise medicine and surgery in any of their branches shall apply to the board of medical supervisors for a license.[1] Applicants shall submit

[1] PRACTICE OF MEDICINE — SURGERY.—The giving of advice and external application of liquid to the eyes by an oculist is not the practice of medicine, but rather of the chirurgical art, and, if an offence, should be so specified in the indictment. U. S. *v.* Williams, 5 Cr. C. C., 62 (1836).

PRACTICE OF MEDICINE—BRANCHES OF THE ART.—Where it was contended that the act (Act of Congress, 1819, February 16th) required a license only to practise the whole medical art, or the whole surgical art, and did not apply to specialists in particular diseases, or with respect to particular organs, such as aurists, dentists, oculists, cuppers, bleeders, etc., it was held, by a majority, that the statute was applicable to every branch of medicine and surgery (*ibid.*).

PRACTICE OF MEDICINE—DEFINITION — ILLUSTRATION.—The statute does not declare what specific acts constitute "practising medicine," nor what it is to "publicly profess to do so"; the courts are to determine in a particular case whether the facts proved bring it within the terms of the statute, taking these in the sense in which they are commonly understood. Springer *v.* D. C., 23 App. D. C., 59.

A person who professed knowledge of the science of medicine, proclaimed himself an expert in the treatment of alcoholism and obtained and had patients in the city of Washington, and diagnosed their cases, decided upon their malady, and who prescribed and furnished the remedies, was properly convicted under the act, though he employed licensed physicians to take immediate charge and to administer the remedies and to exercise their discretion as to frequency of doses and any complication that might ensue (*ibid.*).

He could lawfully have advertised himself and his business elsewhere, and could advertise and sell his remedies as patent medicines are allowed to be sold in the District of Columbia, provided he refrained from making diagnoses and prescribing medicines (*ibid.*).

Selling his compound to persons examined by him and pronounced by him fit subjects of medical treatment was "practising medicine" (*ibid.*).

EVIDENCE.—On a prosecution for practising in the medical art and receiving payment for services, without first having obtained a license (under Act of Congress, 1819, February 16th), the court, by a majority, refused to compel a witness to produce eye-water, prescribed by the defendant, on the ground that its ingredients were immaterial. U. S. *v.* Williams, *supra*.

PROSECUTION BY DEFUNCT MEDICAL SOCIETY.—Where a defendant sought to show that the prosecutor, a chartered medical society, had abandoned its charter, and sought to file an information in the case, in the nature of a writ of *quo warranto*, to establish this defense, his application was denied, by a majority of the court, but decided, by a majority, that defendant could

to examination upon anatomy, physiology, chemistry, pathology, materia medica and therapeutics, hygiene, histology, practice of medicine, surgery, obstetrics and gynecology, diseases of the eye and ear, medical jurisprudence, and such other branches as said board shall deem advisable. Each applicant is certified by said board for examination to the board of medical examiners whose members are adherents to the system of medicine which the applicant desires to practise; the board shall not certify for examination any applicant until satisfactory proof is furnished that he or she is of good moral character and over twenty-one years of age, nor until he or she has presented a diploma conferring upon him or her the degree of doctor of medicine, issued by some medical college authorized by law to confer such degree. Said diploma, if issued prior to July 1st, 1898, shall be accompanied by satisfactory evidence that the applicant has studied medicine and surgery for not less than three years prior to its issue, and if issued subsequent to June 30th, 1898, shall be accompanied by satisfactory evidence that the applicant has studied medicine and surgery for not less than four years prior to the issue of said diploma. All examinations shall be both theoretical and practical, and of sufficient severity to test a candidate's fitness to practise medicine and surgery (*ib.*, s. 3). Application shall be made to the secretary of the board of medical supervisors on a form prescribed by the board, accompanied by a fee of $10. Each application shall be in the hands of the secretary not less than two weeks before the day set for examination; any application may be rejected for refusal to furnish any information called for, or for other irregularity (*ib.*, s. 4). (See Appendix, p. 685.)

LICENSE.—If in the opinion of a majority of the board of medical supervisors, after a careful examination of the report of the board of medical examiners, the applicant has fairly and

show on the trial that the charter was vacated (*ibid.*).

EVIDENCE.—On incompetency, on the ground of disqualifying interest, of testimony of member of prosecuting medical society, see *ibid.*

(Under s. 13) *Evidence.*—A circular stating that a sanitarium outside of the District, in Maryland, of which the accused is advertised as president and general manager, treats disease, is not sufficient proof of violation of this law, nor is the fact of registering at a hotel within the District as Dr. ——; but they are both admissible as evidence tending to show, in connection with other evidence, that accused held himself out as a practitioner in the District, of the specialty indicated in the circular. Springer *v.* D. C., 23 App. D. C., 59.

successfully passed his examination, the board of medical supervisors issues to him a license entitling him after registration to practise medicine and surgery in the District of Columbia (*ib.*, s. 8). A license is issued free of cost and without examination to each physician registered at the health office at the time of the passage of this act and to physicians who may change their residence to the District from any State or Territory where medical laws and medical examining boards exist, the presentation of a certificate or license from a medical examining board, if found on inquiry to be true and genuine, being evidence of the right to registration and certification; *provided* the medical laws and examining boards of such States and Territories grant equal rights and recognition to the licentiates of the board created by this act. Licenses are numbered consecutively, and the secretary of the board of medical supervisors keeps a register showing the number of each license, date of issue, and to whom issued (*ib.*, s. 8). (See Appendix, p. 685.)

Midwifery.—The board of medical supervisors is required to make, subject to the approval of the commissioners of the District, regulations to determine the qualifications of women desiring to commence the practice of midwifery, and to issue licenses, after examination, to those found qualified. No fee shall be charged to applicants; no applicant rejected shall be reëxamined within one year; a license shall be issued free of cost and without examination to each midwife registered at the health office of the District at the time of the passage of this act (*ib.*, s. 9).

Refusal, Revocation.—The board of medical supervisors may, by a vote of four members, refuse or revoke a license, and may cause the name of any person to be removed from the record of the Supreme Court of the District and the register of the health office, for the employment of fraud or deception in passing the examinations, chronic inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or of unprofessional or dishonorable conduct; the accused shall be furnished with a copy of the complaint and given a hearing before the board in person or by attorney, and witnesses may be heard for and in behalf of the accused and the board; appeal may be taken to the Court of Appeals of the District, whose decision is final. Said board may, by a vote of four

members, issue, without examination, a new license restoring such person to his or her rights and privileges within two years from refusal or revocation (*ib.*, s. 10).

RECORD.—A license shall be recorded by the person receiving it, in the office of the clerk of the District, within three months from its date, and the clerk shall certify thereon the place and date of record; after such record, the license must be exhibited at the health office, and the licensee must there register his or her name and address. When a license is revoked the secretary of the board of medical supervisors reports in writing to the clerk of said court and the health officer of the District, who cancel the registration (*ib.*, s. 11).

EXCEPTIONS.—This act does not apply to commissioned surgeons of the United States army, navy, or marine hospital service, nor to regularly licensed physicians and surgeons in actual consultation from other States and Territories, nor to regularly licensed physicians and surgeons actually called from other States and Territories to attend specified cases in the District, nor to the treatment of any case of actual emergency, nor to the practice of massage, or the so-called Swedish movement cure, nor to the use of ordinary domestic remedies without fee, gift, or consideration of any kind (*ib.*, s. 12). The act is not to conflict with the act for the regulation of the practice of dentistry, nor to interfere with graduates of standard dental colleges registered under said act in the exercise of their profession, to the extent and within the limits of the curriculum of such standard dental colleges (*ib.*, s. 15).[1]

OFFENCE.—Practising medicine[1] and surgery or midwifery, or publicly professing to do so, without license and registration, or in violation of this act or the rules made by authority hereunder, or after cancellation of license or registration, is a misdemeanor (*ib.*, s. 13).[2]

[1] See p. 216, note.

[2] Under a former law (Act of Congress, 1819, February 16th, incorporating Medical Society of the District of Columbia) requiring a license from the medical board of examiners of the District, as a condition of practice and the recovery of fees, a physician was held entitled to recover for his services, without a license, where for several years past there had not in fact been a medical board in existence. Woodside *v.* Baldwin, 4 Cr. C. C., 174 (1831). [The briefs in this case indicate that under the law of Maryland a license to practise was required as early as Act 1798, c. 105.] On prosecution, by indictment, under similar conditions, see U. S. *v.* Williams, 5 Cr. C. C., 62.

PENALTY.—Fine of from $50 to $500, or imprisonment in jail ten to ninety days, or both fine and imprisonment (*ib.*, s. 13).

FEES.—To secretary of board of medical supervisors, on application for license, $10 (*ib.*, s. 4).

No fee for license from those licensed as existing practitioners in the District at the time of the passage of the act, nor from physicians coming from other States or Territories and licensed as such (*ib.*, s. 8).

No fee from midwives for license (*ib.*, s. 9).

To clerk of Supreme Court of District, for recording license, 50 cents (*ib.*, s. 11). (See Appendix, p. 686.)

FLORIDA.[1]

BOARDS OF EXAMINERS.[1]—The governor appoints a board of medical examiners for each judicial circuit, and a board of homœopathic examiners for the State (Rev. Stats., 1891, s. 801).

The circuit board is composed of three practising physicians of known ability, graduates in good standing of a medical college recognized by the American Medical Association, residents of the circuit; the homœopathic board is composed of three practising homœopathic physicians of known ability, graduates in good standing of a medical college recognized by the American Institute of Homœopathy (*ib.*, s. 802).

QUALIFICATION.—It is the duty of the board of examiners to examine thoroughly every applicant, upon the production of a medical diploma from a recognized college, upon anatomy, physiology, surgery, gynæcology, therapeutics, obstetrics, and chemistry, but no preference is given to any school of medicine; and it is the duty of the board of homœopathic medical examiners to examine thoroughly every applicant, upon the production of his diploma from a college recognized by the American Institute of Homœopathy, on anatomy, physiology, surgery, gynæcology, materia medica, therapeutics, obstetrics, and chemistry, but no preference is given to any school of medicine (Rev. Stats., 1891, s. 806).

When the board is satisfied as to the qualifications of the applicant, they grant a certificate which entitles him to practise medicine in any county, when recorded (*ib.*, s. 807). Any two members of the board may grant a certificate. Any member may grant a temporary certificate, upon examination, until the

[1] See Appendix, p. 687.

next regular meeting, at which time the temporary certificate ceases to be of effect (*ib.*, s. 808). Before he shall be entitled to practise, the certificate must be recorded in the office of the clerk of the circuit court of the county in which he may reside or sojourn; and the clerk must certify thereon, under official seal, the fact and date of the record, and return the certificate (*ib.*, s. 809).

A practitioner engaged in the practice of medicine in any department prior to May 31st, 1889, upon the production of a diploma from a medical college recognized by the American Medical Association, is granted a certificate, without further examination and without charge (*ib.*, s. 811).

A person who has practised medicine successfully and continuously for fifteen years in the State of Florida and is of good moral character, upon proof of these facts to the board of medical examiners of the judicial circuit where the applicant resides, may secure an examination from such board, in any recognized school of practice which he may elect, and if found competent the said board shall issue a certificate to such applicant (Act 1899, c. 4,697).

Temporary Certificate.—Any member of the several boards of medical examiners may grant a temporary certificate of qualification to any applicant desiring to practise medicine, upon examination, until the next regular meeting of the board, *provided* the applicant has never before received a similar certificate from any member of the several boards. All temporary certificates cease to be of force at the regular meeting next after the granting of the same (Act 1897, c. 4,540).

Exceptions.—This act (Rev. Stats., 1891, ss. 801–812) is not applicable to persons who have complied with prior laws, nor to females practising midwifery, strictly as such. No other person shall practise medicine in any of its branches or departments, without having obtained and recorded a certificate (Rev. Stat., 1891, s. 812).

Penalty.—Practising as a physician without a certificate is punishable by imprisonment not exceeding six months, or a fine not exceeding $200 (*ib.*, s. 2,669).

Fees.—To clerk, legal fee for recording (*ib.*, s. 809).

To board, $10 from each applicant whether certificate granted or not (*ib.*, s. 810). (See Appendix, p. 688.)

Applicant under sec. 811 pays no fee to board (*ib.*, s. 811).

Georgia.[1]

Medical Boards.—The governor appoints three separate boards of medical examiners of five members each, one of the regular school of medicine, one of the eclectic school of medicine, one of the homœopathic school of medicine, men learned in medicine and surgery, of good moral and professional character, graduates of reputable medical colleges, but not members of the faculty of any medical college, each board wholly independent of and separate from the other two in the performance of their duty (Rev. Code, 1895, s. 1482). Meetings are held on or just before graduation day of each medical college chartered in the State, after consultation with the college faculty, to suit a majority of the students graduating from said college, the other on the second Tuesday of October, each in such city as each board determines; special meetings may also be held. Each board examines and passes on the qualifications of applicants for the practice of medicine (*ib.*, s. 1,485).

Examinations.—Each board at any meeting must examine only persons applying, who are graduates of an incorporated medical college, school, or university, that requires not less than three full courses of study of six months each ; but any person *now* matriculated (*i.e.*, Act 1894, p. 87) as a student of medicine at any medical college, after graduation, and any person from another State, who graduated prior to April 1st, 1895, at a lawfully chartered medical college requiring only two courses of study, shall be eligible for examination and license.[1] The applicant for examination shall hold a lawfully conferred diploma from an incorporated medical college which conforms to the system of practice represented by the board to which the application shall be made, unless he desires to practise a different system.[2] No applicant rejected by one board shall be examined or

[1] On history and policy of early legislation in the State respecting licensing of physicians (particularly Thompsonian or Botanic physicians), see Newsom *v.* Lindsey, 21 Ga., 365 (1857); see also Maddox *v.* Boswell, 30 Ga., 38 (1860). On the former rights and powers of The Georgia Medical Society, see State *v.* The Georgia Medical Society, 38 Ga., 608 (1869).

[2] Proof of Diploma.—Under former act (1854) *held*, that physician suing for services, and alleging a diploma from a medical college (of another State), must prove that the diploma offered was given by a college existing at the time, and the charter or act of incorporation must be produced for that purpose; that the legal existence of a body corporate of another State can not be rec-

licensed by either of the others. If an applicant desires to practise a system not represented by any established board he may elect which of the boards he will appear before for examination. When the applicant passes an examination satisfactory as to proficiency before the board in session, the president thereof grants a certificate to that effect. If the applicant fails to pass a satisfactory examination, he shall not be permitted further examination within the next three months. If in the opinion of the president of the board, the applicant has been prevented by good cause from appearing before said board, the president and two members shall examine the applicant, and may grant him a certificate with the same force and effect as though granted by the full board, until the next regular meeting of the board, when, if the applicant fails to appear for examination, the said certificate shall be void (*ib.*, s. 1,486).[1]

Licensees of Other State Boards—License of Former Practitioners Desiring to Locate Outside of the State.—After the passage of this act (August 13th, 1904), the board of medical examiners of Georgia may, on receipt of a license fee of $10, without examination, indorse licenses issued by other State boards having an equal standard and requirements with the Georgia board; provided such other boards accord to the licensees of the Georgia board the same courtesy; and said other board licenses, when indorsed, entitle the holder to register in this State, and to all the rights and privileges thereby granted; provided, further, that all physicians in regular standing who graduated before the act creating the State examining boards be granted license without examination or payment of fees, who desire to locate outside of this State. All laws and parts of laws in conflict with this act are repealed (Act 1904, c. 593).

Recording Certificate.—Before practising medicine or

ognized here without proof. Hunter *v.* Blount, 27 Ga., 76 (1859).

In an action by a physician for his services, the defence was that plaintiff was not a licensed physician, nor a graduate from a Georgia medical college, and not entitled by law to collect his accounts; *held*, that a diploma purporting to be from a New Orleans college, with no proof of its signature or execution, nor of the charter of the college, was not admissible in evidence. Parkerson Adm. *v.* Burke, 59 Ga., 100 (1877).

[1] On right of holder of temporary license from a member of a board under former law to recover for his services, where he had not been refused a license by the Board, see Wragg *v.* Strickland, 36 Ga., 559 (1867).

surgery, the holder of a certificate from a board or a committee of a board must cause it to be recorded in the office of the clerk of the Superior Court of the county in which he resides.[1] If he does not reside in the State he shall cause it to be recorded in any county in the State in which he offers to practise (Rev. Code 1895, s. 1,488).

QUALIFICATION.[2]—[No person is to practise medicine, unless he was theretofore legally authorized, or is hereafter authorized by a diploma from an incorporated medical college, medical school or university,[3] or has after attending one or more full terms at a regularly chartered medical college, been in active practice of medicine since the year 1866,[4] or was by law authorized to practise medicine in 1866, or shall have been licensed by the medical board (Rev. Code, 1895, s. 1,477).] No person is to commence to practise after January 1st, 1895, without com-

[1] REGISTRATION — RECOVERY FOR SERVICES.—Where a physician sued for his services, and had previously applied to the clerk of the court to be registered, but the clerk at the time of the application had no book for the purpose, and it appeared that the physician subsequently registered, and as soon as he could by mandamus have compelled the clerk to furnish the book; held that he could recover from the patient, notwithstanding he was not registered at the time of the services, the court indicating that patients were not to be deprived of the services of a physician, nor the physician of his right to practise and recover for his services, because the clerk neglected to comply with the law, where the physician had done his best to comply. Parish *v.* Foss, 75 Ga., 439 (1885).

PHYSICIAN'S REMEDY AGAINST CLERK OF COURT.—Where the clerk fails to keep a book for registry, and on that account fails or refuses to register an applicant, the physician is entitled to a mandamus to compel the clerk to furnish the book (*ib.*).

MUNICIPAL LICENSE. — A physician licensed by the State cannot be required by a municipality to take out a license. The city might tax the exercise of the profession, but could not levy its tax by requiring the physician to take out a license. Mayor, etc., of Savannah *v.* Charlton, 36 Ga., 460.

[2] The Act of 1894, pp. 85–89 (No. 31), s. 11, establishing boards of medical examiners, repealed all laws and parts of laws in conflict with its provisions. In the revision of 1895 this act is found in sections 1,482–1,491 inclusive, it seems to have superseded all inconsistent provisions of other laws, at least after January 1st, 1895, but nevertheless in the revision of 1895, the prior law is still found in sections 1,477–1481 inclusive. Some of its provisions seem inconsistent with sections 1,482–1491, others seem harmonious and not in conflict. We have given all provisions substantially as they are found, but it would seem that where sections 1,477–1,481 in any respect conflict with sections 1,482–1,491, the latter control. The provisions which seem to have been superseded are enclosed above in brackets, thus [ ].

[3] See *infra*, title Offence.

[4] EXCEPTION.—The exception in the law as it existed in 1874 in favor of physicians in practice from 1863, applied only to physicians in practice in Georgia, and not in another state. Parkerson Admr. *v.* Burke, 59 Ga., 100 (1877).

plying with Art. 2 of chap. 4, Rev. Code, 1895, entitled "Medical Board" (*ib.*, s. 1,489).[1]

DEFINITION.[2]—[To "practise medicine" means to suggest, recommend, prescribe, or direct, for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of mind or body, or for the cure or relief of any wound, fracture, or other bodily injury, or any deformity, after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation[3] (*ib.*, s. 1,478).] To practise medicine or surgery within meaning of the article entitled "Medical Board" is to prescribe for the sick, or those in need of medicine or surgical aid, and to charge or receive therefor money, or other compensation or consideration, directly or indirectly.[4] But midwives and nurses

[1] Under a former act (1825, as reenacted 1847), it was held that all contracts founded on services rendered as a physician or surgeon by a person not licensed, in prescribing for the cure of diseases were void; that services rendered as a hydropathic practitioner for disease were within the prohibition of the act; that in prescribing water, or anything else, or any mode of treatment for disease, the practitioner assumed to be a physician; and it makes no difference whether he be an ignorant pretender or as learned as Galen, in either case he is prohibited from collecting his account by law. And where the law exempted the holder of a diploma from a medical college from examination, it did not exempt him from taking out a license, and it was doubtful whether such holder, unlicensed, could recover for his services. It could not be pretended that because the practitioner's physic was pure water and his treatment swathing and friction, that he was not therefore one who, as a physician, prescribed for the cure of disease; he was as obnoxious to the law as if he prescribed calomel and jalap, or steam and No. 6, or homœopathic infinitesimals, or phlebotomy and hot water. And in this case he was not even permitted to recover the value of an outfit of linen, etc., furnished to the patient by him, and which was the means by and with which he applied his prescriptions and rendered his services, the court holding that the law contemplated that he should not be permitted to enforce any obligation, express or implied, which springs out of the illegal exercise of the profession. The court refused to say but what any citizen might gratuitously practise medicine, but there is no reason why the practice of hydropathy should not upon judicious terms be under the sanction and protection of the law. Coyle *v.* Campbell, 10 Ga., 570.

On sufficiency of petition of *certiorari* to bring up for review questions upon the right of a licensed apothecary to charge for visits, prescriptions, and medicine, see McCardle *v.* Fogarty, 41 Ga., 626.

On necessity of license under former law (Act 1839) to entitle physician to recover for his services, see Bower *v.* Smith, 8 Ga., 74.

[2] See p. 224, n. 2.

[3] PRACTICE.—It is too late after plea to merits to object that it is not averred in the declaration nor proven that physician suing for his services was a licensed physician. Durand *v.* Grimes, 18 Ga., 693 (1855).

[4] PHYSICIAN.—Under a former law requiring one of the commissioners on an inquisition in lunacy to be a

are not regarded as practising medicine or surgery (*ib.*, s. 1,490).

REGISTRATION.[1]—[Every person lawfully engaged in practice must register, before commencing to practise, in the office of the clerk of the Superior Court of the county wherein he resides and is practising, or intends to commence the practice of medicine, his name, residence, and place of birth, together with his authority; he shall subscribe or verify, by oath or affirmation, before a person duly qualified to administer oaths under the laws of this State, an affidavit containing such facts, and whether such authority is by diploma or license, and the date of the same, and by whom granted, which shall be exhibited to the county clerk, before the applicant is allowed to register (*ib.*, s. 1,479).]

REMOVAL.[1]—[A registered physician changing his residence from county to county must register in the clerk's office of the county to which he removes and wherein he intends to reside and to practise medicine (*ib.*, s. 1,480).]

OFFENCE.—Failing to register or practising medicine or surgery in violation of the Civil Code is a misdemeanor (Penal Code, 1895, s. 485, Rev. Code, 1895, s. 1,491).[2] The faculty or officers of a medical college, granting or issuing a diploma to any student of medicine or other person, unless he shall have attended two or more full courses of study in some regularly chartered medical college in good standing, and shall have passed a creditable examination by the faculty or professors of said college on all the branches usually taught in medical colleges, shall be punished as for a misdemeanor. A medical college is not prevented from graduating a student who has taken two courses of lectures, if he was not absent more than one-fourth of the term or course (*ib.*, s. 486).

PENALTY.[1]—Not to exceed $1,000, imprisonment not to exceed six months, to work in the chain gang on the public works,

physician, one of the commissioners was a practitioner of medicine, holding a diploma from the Jefferson Medical College of Philadelphia, but had not been licensed by "the Board of Physicians of this State" (under law then in force, Law 1825, 1839, 1847), *held* that the law contemplated a physician who was such by the laws of Georgia, viz., those licensed under the law of Georgia, and an inquisition on which no such physician sat was properly dismissed. Norwood *v.* Hardy, 17 Ga., 595.

[1] See p. 224, n. 2.

[2] See p. 225, n. 1.

or on such other public works as the county authorities may employ the chain gang, not to exceed twelve months; any one or more of these punishments in the discretion of the judge (Penal Code, 1895, s. 1,039, Act 1895, No. 17, pp. 63, 64, s. II.). No compensation for services rendered (Rev. Code, 1895, s. 1,491).[1, 2, 3]

EXCEPTIONS.[4]—Persons lawfully engaged in the practice of medicine or surgery in the State of Georgia on January 1st, 1895 (*ib.*, s. 1489).[5, 6] Commissioned medical officers (*ib.*, ss. 1,481, 1,489), or contract surgeons (*ib.*, s. 1,489) of the United States army or navy, or United States marine hospital service, in performance of their duty as such (*ib.*, s. 1,489), and physicians or surgeons residing in any State or Territory of the United States, or in the District of Columbia, who may be *bona fide* called in consultation in a special case with a legally qualified physician or surgeon residing in this State (*ib.*, s. 1,489). A non-resident physician or surgeon called in consultation in a special case shall not be permitted to engage in continuous practice or consultation in connection with any resident physician or surgeon under any form of agreement or contract, direct or indirect (*ib.*, s. 1,489). [Legally qualified dentists in the practice of their profession, and women practising only midwifery, are not affected (*ib.*, s. 1,481).]

FEES.—[To county clerk, fifty cents for each registration (*ib.*, s. 1,479).] For recording a certificate, same as for recording a deed (*ib.*, s. 1,488). To medical board before examination, $10 (*ib.*, s. 1,486). No fee for subsequent examination (*ib.*). To board, for license fee for indorsement of license of other State board, $10 (Act 1904, c. 593). No fee for license to person who desires to locate outside of State under terms of Act 1904, c. 593, s. 1 (Act 1904, c. 593, s. 1).

LICENSE TAX.—[On practitioners of physic, $5 per annum (Rev. Code, 1882, s. 809).] The medical law (c. 4, art. 2, Rev. Code, 1895) does not affect or change in any way laws in reference to license tax to be paid by physicians and surgeons

[1] See p. 224, n. 1.
[2] See p. 225, n. 3.
[3] See p. 225, n. 1.
[4] See p. 224, n. 2.
[5] EVIDENCE.—Certificate of clerk of Superior Court of county of physician's residence, showing that he duly registered prior to 1895 in compliance with the Civil Code, s. 1,479, is *prima facie* evidence of his right to practise medicine. Trentham *v.* Waldrop, 119 Ga., 152 (1903).
[6] See p. 224, n. 4.

(Rev. Code, 1895, s. 1,486). It is unlawful to practise medicine and charge for the same without paying said special tax (Act 1896, p. 37, Van Epps' Supplement to the Code, 1901, s. 6,047). To practise medicine and charge for the same after return of *nulla bona* on execution issued by tax collector of any county, is a misdemeanor, punishable as prescribed in s. 1,039, vol. iii., Code 1895 (*ib.*, s. 6,048). Misdemeanors are punishable by fine not to exceed $1,000, imprisonment not to exceed six months, or work in the chain gang not to exceed twelve months, or any one or more of these punishments in the discretion of the judge (vol. iii., Code 1895, s. 1,039); after return of *nulla bona* on such execution, the person in default shall not be allowed or entitled to have or collect any fees or charges for his services rendered thereafter, until he shall pay said tax in full with interest and costs (Van Epps' Supplement to Code, 1901, s. 6,049, Act 1896, p. 37). Confederate soldiers on the indigent pension roll, and otherwise entitled under the laws of the State to practise, are not subject to this tax (Van Epps' Supplement, s. 6,050, Act 1899, p. 99).

HAWAII.*

*See Appendix, pp. 688 and 707.

THE LAW IN HAWAII.—The laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of the "act to provide a government for the Territory of Hawaii" (*i.e.*, this act), shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States (Act of Congress, 1900, c. 339, s. 6).

The laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature (*ib.*, s. 83).

[There shall be a TREASURER,[1] who shall have the powers and

[1] The power of appointment was given to the governor, with the advice and consent of the Senate, by the Organic Act (Act of Congress, 1900, c. 339, s. 80); the office of Minister of the Interior was abolished (*ib.*, s. 8); and to the treasurer were given the powers and duties which relate to licenses (*ib.*, s. 72). The treasurer, nevertheless, had not the power to revoke licenses granted by a former treasurer upon the recommendation of the board of health, acting upon the report of a board of medical examiners appointed by the treasurer instead of by the governor. The board of medical examiners were *de facto* officers and their acts could not thus be collaterally attacked. There was considerable color of law

duties of the *Minister of the Interior* which relate to *licenses* under the laws of Hawaii (*ib.*, s. 72).][1]

Until the legislature of Hawaii shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided (*ib.*, s. 81).

All offences which were punishable as offences against the republic of Hawaii shall be punishable as offences against the government of the Territory of Hawaii, unless such statute is inconsistent with this act or shall be repealed or changed by law (*ib.*, s. 10).

Board of Medical Examiners.—[' The Minister of the Interior][2] is to appoint a board of medical examiners to examine all applicants for license to practise medicine or surgery and report the result to the board of health. Such board of medical examiners consists of three persons, licensed physicians or surgeons under the laws of the [republic] (Law, 1896, c. 60; Ballou's Penal Laws, Hawaii, 1897, s. 830).

Qualification.—No person shall practise medicine or surgery as a profession gratuitously or for pay, or shall offer to so practise, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practise, without having first obtained from the [' Minister of the Interior] under seal of his department, a license.[3] Such license shall only be granted upon the written recommendation of the board of health.[3] Licenses granted by the Minister of the Interior upon the recommendation of the board of health, in force at the time of the passage of this act (1896, Act 60), shall remain in force subject to its provisions (*ib.*, s. 827).

for appointments by the treasurer, but the Court did not determine the validity of the appointment. Nino Miya *v.* Treasurer, 15 Haw., 273 (1903).

[1] The *legislature of Hawaii* (Act 1903, c. 61, s. 365) has devolved the duties of the *Minister of the Interior* under the medical laws upon the *Secretary of the Territory*. It would seem that the legislature had this power under ss. 69 and 72 of the Act of Congress, and that therefore the duties under the medical law devolved by the Act of Congress upon the Treasurer now rest upon the Secretary of the Territory.

[2] See note, p. 228.

[3] Under the law of July 1st, 1870 (which differed in its phraseology from the present law), the practitioner must first secure both a certificate of approval from the board of health and a license from the Minister of the Interior; and the license alone or the certificate alone was insufficient to authorize practice; and a practitioner, having a license, but not the certificate of the board of health, was not entitled to recover for his services or medicines administered or furnished by him in his practice. See Ping Ying *v.* Parke, 4 Haw., 1.

DEFINITION.—The practice of medicine includes the use of drugs and medicines, water, electricity, hypnotism, or any means or method, or any agent, either tangible or intangible, for the treatment of disease in the human subject; but no person is forbidden from the practice of any method or the application of any remedial agent or measure under the direction or with the approval of a licensed physician (*ib.*, s. 828).

EXAMINATION.—No person shall be recommended by the board of health for a license except on the written report of a board of medical examiners, setting forth that the applicant has been duly examined and found to be possessed of the necessary qualifications (*ib.*, s. 829).

REVOCATION.—Licenses under this or previous act may be revoked by [the Minister of Interior [1, 2]] for professional misconduct, gross carelessness, or manifest incapacity, proven to the satisfaction of the board of health and by that body reported to the [minister [1]], who shall immediately notify the holder, of revocation in writing (*ib.*, s. 833). The accused shall be notified in writing of the charge and of the time and place of hearing, and may present evidence and be heard (*ib.*, s. 834).

OFFENCE.—To practise medicine or surgery or offer or attempt to so practise, or to advertise or announce one's self, publicly or privately, as prepared or qualified to so practise, contrary to s. 827, is a misdemeanor (*ib.*, s. 832).

PENALTY.—Fine not more than $250 (*ib.*, s. 832).[3]

A person attempting to cure another by sorcery, witchcraft, anaana, hoopiopio, hoounauna, hoomanamana, or other superstitious or deceitful methods, on conviction before a district magistrate shall be fined not less than $100 nor more than $200, or be imprisoned at hard labor not to exceed six months (*ib.*, s. 836).

FEE.—To the [Minister of the Interior [1]] $10 before examination (*ib.*, s. 831). To be paid into the treasury of the Territory (Act 1903, c. 61, s. 366).[4]

SECRETARY OF THE TERRITORY.—The duties formerly required by the laws relative to licensing the practice of medicine

[1] See p. 229. n. 1.

[2] See note, p. 228.

[3] The penalty is intended to prohibit the transaction, therefore there can be no recovery for services or medicines by an unauthorized practitioner. Ping Ying *v.* Parke, 4 Haw., 1.

[4] The former act (July 1st, 1870) was held not to be a revenue statute, there being no charge for certificate and license (*ib.*).

and surgery to be performed by the Minister of the Interior are now devolved upon the secretary of the Territory (Act 1903, c. 61, s. 365). Otherwise the said law remains in full force and effect (*ib.*, s. 364).[1]

IDAHO.

STATE BOARD OF MEDICAL EXAMINERS.—Appointed by the governor, consists of six members, a majority of whom shall never be appointed from nor represent any one school of medicine, and not less than three schools shall be at all times represented on said boards, all graduates of reputable medical colleges or universities, in good standing, and learned and skilled in the theory and practice of medicine and surgery, and of good moral repute. After the organization of the board, no person shall be appointed on it who is not in possession of a license to practise medicine and surgery in this State (Pol. Code 1901, s. 566). The board has authority to prescribe and establish all needful rules, regulations, and by-laws, not inconsistent with the laws of the State or the United States, to carry this law into effect (*ib.*, s. 567). Any member of the board has authority to administer oaths; the board has authority to take testimony whenever it is necessary upon any subject relating to its official acts or duties (*ib.*, s. 568). The board holds regular meetings on the first Tuesday of April and October, at the capital or other places designated by the board; special meetings may also be held. The board shall keep a special register containing the names and addresses of all applicants for license, together with the data required to be furnished on the application, and whether the applicant received license or was rejected, and, if rejected, the reasons. The register is *prima facie* evidence of all matters therein recorded and is a public record (*ib.*). Public records are at all times during office hours open to the inspection of any citizen (*ib.*, s. 338).

The board is required to investigate all complaints of noncompliance with or violations of this law and to bring all such cases to the notice of the proper prosecuting officers (*ib.*, s. 578).

LICENSE TO FORMER PRACTITIONERS.—All persons, except as below, who were legally engaged in practice within the State under the medical act of 1887, at the time of the passage of this

[1] See p. 229, n. 1.

act (March 3d, 1899), were entitled to be licensed without examination on application to the State board of medical examiners, within six months from the taking effect of the act. Persons who received license under law of 1897 were simply required to transmit such license. Upon fulfilment of these requirements the board was required to issue a license; persons who failed to avail themselves of this section are subject to sec. 6 (Act 1899, p. 346, s. 5).[1]

Qualification.—Every person, except as below, desiring to commence the practice of medicine or surgery or either of them, shall, prior to commencing, make written application to the State board of medical examiners, upon blanks furnished by the board, for a license, and shall transmit his or her diploma with an affidavit setting forth that the diploma is genuine and the applicant is the rightful possessor and the identical person named therein, and that the same was obtained by pursuing the regular course of study or examination in said institution, and that he or she is a citizen of the United States or has declared his or her intention of becoming such. If the diploma has been issued by a reputable college of medicine in good standing, the applicant shall be eligible to examination (*ib.*, s. 570). No applicant for license shall be allowed to practise medicine and surgery or either of them until such license shall have been granted. Applicants must furnish sufficient evidence of good moral character. The cost of transmission of papers of the applicant to and from the board shall be paid by the applicant (*ib.*).

Examinations.—Applicants shall be examined in the applied branches of the theory and practice of medicine and surgery or either of them, as those branches are taught in the reputable chartered schools of the system of medicine to which the applicant belongs and which he intends to practise, and shall include anatomy, physiology, pathology, diagnosis, hygiene, chemistry, histology, and toxicology (*ib.*).

The board shall cause the examination to be scientific and practical, and sufficiently thorough to test the applicant's fitness to practise medicine and surgery or either of them, and if the applicant correctly answer at least seventy-five per cent of all questions submitted, the board shall grant the applicant a license

[1] This provision is omitted from the text of the Political Code of 1901; it is inserted in a footnote to section 570 thereof.

to practise medicine and surgery (*ib.*) [see FEES below]. If the applicant fails to pass, he or she may be re-examined after six months and within one year without payment of additional fee, and thereafter the applicant may be examined as often as desired at any regular or special meeting of the board on payment of the regular fee (*ib.*).

All questions upon the different branches of medicine and surgery submitted by the board to candidates shall be written or printed, or partly written and printed, and the questions on each branch shall be arranged upon separate sheets of paper and numbered consecutively. The candidate shall be supplied with a list of the questions upon but one branch or subject at a time, which after completing his or her answers thereto he or she shall be entitled to the next list, and so on until examined in all branches required. All answers shall be in writing on paper furnished by the board. No candidate shall furnish his own paper. Each list of answers shall bear the same title as the corresponding list of questions, and each answer shall be numbered to correspond with the question to which it refers. The questions and answers shall be kept on file by the secretary of the board and shall be part of the records of said office (*ib.*, s. 572).

REFUSAL OF LICENSE.—The board may refuse a license for unprofessional conduct or conduct of a criminal, immoral, or dishonorable nature (*ib.*, s. 570).

In case of refusal to grant license, the applicant may have the action of the Board reviewed by the district court in and for the county in which the meeting was held, where license was refused or other county agreed on, but such proceeding must be instituted within ten days after notice of such refusal *upon* the applicant (*ib.*, s. 9).

UNPROFESSIONAL OR DISHONORABLE CONDUCT means procuring or aiding or abetting in procuring a criminal abortion, employing what are popularly known as cappers or steerers in procuring practice, obtaining a fee on the assurance that a manifestly incurable disease can be permanently cured, a wilful betrayal of professional secrets to the detriment of a patient, all advertisements of medical business in which untruthful or improbable statements are made, all advertisements of any kind of any medicine or means whereby the monthly periods of women can be regulated, or the menses can be re-established if

suppressed, conviction of any offence involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants (*ib.*, s. 571).

Suspension, Revocation, Cancellation of License.—When complaint is made to the board, of unprofessional or dishonorable conduct of a licentiate, the board shall have power to hear evidence of complaints against licentiates, and, if satisfied of the justice of the complaint, must institute proceedings in the district court of the county where such licentiate resides, for the suspension, revocation, or cancellation of such license. The district courts are vested with jurisdiction to hear and determine such proceedings and to suspend or revoke and cancel any license at issue in such proceeding. The accused may appear in person or by counsel at every stage from the first hearing before the board to the final disposition in the district court. Costs shall be assessed as justice shall require. The county attorney appears for the board (*ib.*, s. 573).

Recording.—Every person receiving a license must have it recorded within thirty days thereafter, in the office of the county recorder within the county where the licentiate intends to practise; otherwise said license is void (*ib.*, s. 574).

The county recorder of each county is required to make a note in his record of the revocation of a license on notice from the secretary of the board, and of the death or removal from the county of any person whose license is on record with him; he furnishes a list of all licenses on record in his office to the secretary of the board on December 1st, annually (*ib.*).

Licenses are numbered consecutively in the order of their issue (*ib.*, s. 575).

Definition.—"Respectable or reputable medical college or university in good standing" means such medical colleges or universities as are legally chartered, reputable, and in good standing within the State or county where they are located (*ib.*, s. 576).

Any person shall be regarded as practising medicine or surgery or either who shall advertise in any manner or hold himself out to the public as a physician and surgeon or either in this State, or who shall investigate or diagnosticate or offer to investigate or diagnosticate any physical or mental ailment of any person with a view of relieving the same as is com-

monly done by physicians and surgeons, or suggest, recommend, prescribe, or direct for the use of any person, sick, injured, or deformed, any drug, medicine, means, or appliance for the intended relief, palliation, or cure of the same, with the intent of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever (*ib.*, s. 577).

EXCEPTIONS.—This law shall not apply to dentists and registered pharmacists or midwives in the legitimate practice of their respective professions, nor to services rendered in cases of emergency where no fee is charged (*ib.*); nor to commissioned medical officers of the United States army, navy, and marine hospital service in the discharge of their official duties, nor to railway surgeons in the discharge of official duties, nor to legally qualified physicians and surgeons from other States when called in consultation with any legally qualified physician and surgeon of this State (*ib.*, s. 579).

PROSECUTIONS for violation of this law are conducted by the prosecuting attorneys of the counties; in cases of appeal to the Supreme Court of the State, the attorney general represents the board (*ib.*, s. 578).

OFFENCE.—Practising medicine and surgery without a license or contrary to the provisions of the above law (ch. xv., Pol. Code) is a misdemeanor. Each day of such practice is a separate offence (Penal Code, 1901, s. 4,739). (See p. 689.)

PENALTY.—A fine of from $50 to $300, or imprisonment in a county jail from ten days to six months, or both fine and imprisonment with costs of prosecution (*ib.*).

Presenting to the board as his or her own, the diploma of another, or a forged affidavit of identification, or attempting to personate another medical practitioner of a like or different name, is subject to such fine and imprisonment as are provided for forgery (*ib.*, s. 4,740).

FEES.—To accompany application for license under section 5 of Act 1899, $5 (Act 1899, p. 346, s. 5). To accompany application under Pol. Code, section 570, $25 (Pol. Code 1901, s. 570); if applicant fails fee is not returnable (*ib.*) (see title EXAMINATIONS).

Illinois.[1]

Qualification.—No person shall begin to practise medicine or any of its branches or midwifery[2] without applying for and obtaining a license from the State Board of Health.[3]

[1] For statement of objects of these statutes, see People *v.* Gordon, 194 Ill., 571.

The first act in the State went into effect July 1st, 1877; the second, July 1st, 1887; the present act, July 1st, 1899. State Board of Health *v.* Ross, 191 Ill., 87.

The Act of 1887 repealed the Act of 1877; the Act of 1899 repealed the Act of 1887; the Act of 1877 is no longer in force. *Ib.*

The law (so held of former law of 1887) falls within the police power of the State; its purpose was to protect health, promote the welfare of society, and protect it from imposition and fraud, to punish fraud, deception, charlatanry, and quackery, and prevent empiricism, and to bring the practice of medicine under such control as to exclude, as far as possible, the ignorant and unscientific practitioner; and within the regulation falls the right to determine or to provide the means of determining who may lawfully exercise the right to practise, and to establish rules to determine what shall not be regarded as legitimate practice. People *v.* Blue Mountain Joe, 129 Ill., 370.

Constitutionality (of the Act of 1887).—The terms "to regulate the practice of medicine in the State of Illinois" were sufficiently broad to include the entire range of practice of the medical profession, and section 11 (applying to itinerant venders) was valid. People *v.* Blue Mountain Joe, 129 Ill., 370.

The title of the present act is the same in the respect above named.

The Act of 1877 was constitutional; it was within the police power of the State. Williams *v.* People, 121 Ill., 84.

The Court refused to pass on the constitutionality of the provision of the Act of 1877 respecting revocation of certificates. Williams *v.* People, 121 Ill., 84.

[2] Midwifery is the practice of medicine within the meaning of the statute (Act of 1887). People *v.* Arendt, 60 Ill. App., 89.

On a prosecution for practising as a midwife in violation of section 9, an appeal from a conviction before a justice of the peace of Cook County should be taken to the criminal court of Cook County, and not to the circuit court. Bratsch *v.* People, 195 Ill., 165.

[3] An unlicensed physician cannot recover fees for his professional services. (So held under a former law.) City of Chicago *v.* Honey, 10 Ill. App., 535.

In a suit for a physician's services a license or due qualification will be presumed. County of Jo. Daviess *v.* Staples, 108 Ill. App., 539 (citing Williams *v.* People, 20 Ill. App., 92; City of Chicago *v.* Wood, 24 Ill. App., 40; Shendorf *v.* Gorman, 86 Ill. App., 276; Good *v.* Lasher, 99 Ill. App., 653; but stating that some doubt is thrown on this by *obiter dicta* in North Chicago St. Ry. Co. *v.* Cotton, 140 Ill., 486, and Tichenor *v.* Newman, 186 Ill., 264).

At Common law a surgeon could recover for his services. *Ib.*, citing 2 Chitty on Contracts, 11th Am. Ed., 836, to the effect that in the American States, in the absence of statutory restraints, physicians and surgeons have the same right of recovery for services as others have.

In the absence of proof, it is presumed that the common law prevails in a sister State; accordingly a physician suing for services rendered in another State may recover without proof that he was licensed there, there being no evidence that the law of that State required a license. *Ib.*

This act is constitutional, its title is broad enough, and it does not confer special privileges. People *v.* Gordon, 194 Ill., 560; reversing 96 Ill. App., 456.

Application shall be in writing, accompanied by the examination fees and proof that applicant is of good moral character. Applications from candidates who desire to practise medicine and surgery in all their branches shall be accompanied by proof that the applicant is a graduate of a medical college or institution in good standing, as may be determined by the board.[1] When the application has been inspected by the board and found

Former similar acts were constitutional: Act of 1877, Williams *v.* People, 121 Ill., 84; Act of 1887, People *v.* Blue Mountain Joe, 129 Ill., 370.

Where the question of the physician's right to practise arises only collaterally, proof that he has practised in the State a long time shows *prima facie* that he was lawfully entitled to practise. If he were to sue to recover for professional services, he would doubtless have to show affirmatively his compliance with the law regulating the practice of medicine. North Chicago St. Ry. Co. *v.* Cotton, 140 Ill., 486; see also Good *v.* Lasher, 99 Ill. App., 653.

In a prosecution the burden was not on the people to show that defendant was not licensed. The averment, being peculiarly within the knowledge of the defendant, is taken as true unless disproved. Williams *v.* People, 121 Ill., 84.

Form of indictment. Williams *v.* People, 20 Ill. App., 92.

In an action for services as a physician and nurse, it was error to instruct that there could be no recovery unless plaintiff proved by competent evidence that he had a license duly issued. Byrne *v.* Panesi, 77 Ill. App., 164.

Where the question of license or qualification arises collaterally in a civil action between third parties, the license or due qualification will be presumed. City of Chicago *v.* Wood, 24 Ill. App., 40. Also, where the physician sues to recover for services (citing Williams *v.* People, 20 Ill. App., 89, and criticising City of Chicago *v.* Honey, 10 Ill. App., 535, to the contrary). The reason rests upon the principle that when an act is required by positive law to be done, and the omission would be a misdemeanor, the law presumes that it has been done, and the party relying on the omission must make some proof of it, though a negative. *Contra* in prosecutions by the public. City of Chicago *v.* Wood, 24 Ill. App., 40.

Slight evidence of a physician's right to practise is sufficient against one who called him and thereby recognized his right to exercise the functions of his profession; the physician's own testimony that he had practised, had a certificate from the State board, and evidence that his name appeared on the register in the county clerk's office was sufficient. Chicago & Alton R. R. *v.* Smith, 21 Ill. App., 202.

[1] Whether a college is reputable or not is a question of fact; the duty of ascertaining it is judicial, and involves investigation, judgment, and discretion; it is within the judgment and discretion of the board to determine (so held under the dental law). People *v.* Illinois State Board of Dental Examiners, 110 Ill., 180.

On mandamus as a remedy, see same. Illinois State Board of Dental Examiners *v.* People, 20 Ill. App., 457.

The State board of health (under the law of 1887) was empowered to determine whether a medical college was in good standing; when the board has determined that question in favor of the applicant, it may not arbitrarily refuse a license. When the board determines that a college is not in good standing, mandamus will not lie to compel the issue of a license. Mandamus will not lie unless it clearly appears that there has been an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform it. Illinois State Board of Health *v.* People, 102 Ill. App., 614.

to comply with these requirements, the board shall notify the applicant to appear before it for examination at the time and place mentioned in the notice (Law 1899, p. 273, s. 1; Jones & Addington's Supp., 1902, p. 826 *et seq.*).

EXAMINATIONS may be wholly or partly in writing and shall be sufficiently strict to test the qualifications of the candidate as a practitioner. The examination of those who desire to practise medicine and surgery in all their branches shall embrace those general subjects and topics a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine by reputable medical colleges in the United States. The examination of those who desire to practise midwifery shall determine the qualification of the applicant to practise midwifery. The examination of those who desire to practise any other system or science of treating human ailments, who do not use medicines internally or externally and who do not practise operative surgery, shall be sufficiently strict to test their qualifications as practitioners.[1] Examinations shall be conducted under rules prescribed by the board, providing for a fair and wholly impartial method of examination. Graduates of legally chartered medical colleges in Illinois in good standing, as may be determined by the board, may be granted certificates without examinations (*ib.*, s. 2).[2]

LICENSE.[3]—If the applicant successfully passes his examina-

[1] The State board of health is authorized to divide those who desire to practise medicine into two classes, viz., those who desire to practise medicine and surgery in all their branches, and those who desire to practise any other system or science of treating human ailments. Section 7 defines what shall be regarded as practising physicians as including both classes. Where the testimony tended to show that the treatment was of the nature of osteopathy and the practitioner had no license, the jury should not have been instructed to find for the accused. *It seems* that *osteopathy* is more than the treatment which a trained nurse might administer. While it may not be *practising medicine* in the common acceptation, it is treating, etc., a physical ailment within the meaning of the act. It is not *mental* or *spiritual means* within the exception in section 7; it is not necessary in this case to consider the meaning of "material remedy"; attempting to treat by appealing to the mental faculties in aid of other remedies applied or prescribed is not *mental* or *spiritual means*. People *v.* Gordon, 194 Ill., 560.

[2] Section 2 by implication excludes persons practising prior to July 1st, 1899. State Board of Health *v.* Ross, 191 Ill., 87.

[3] The right to practise medicine is conferred by law, and he who adopts it as a profession must conform to its reasonable requirements in the discharge of his professional duties. Accordingly, where a town was authorized by its charter to license, regulate, and suppress the sale of liquors, it could prohibit a physician from giving a prescription to a person in good health, to enable him to

tion, or presents a diploma from a legally chartered medical college in Illinois of good standing, the board shall issue a license authorizing him to practise medicine, midwifery, or other system of treating human ailments, as the case may be.[1] Those who are authorized to practise other systems cannot use medicine internally or externally or perform surgical operations. Only those who are authorized to practise medicine and surgery in all their branches shall call or advertise themselves as physicians or doctors.[2] Those who are authorized to practise midwifery shall not use any drug or medicine or attend other than cases of labor (*ib.*, s. 3).

Refusal or Revocation of License.—Any wilful violation on the part of the applicant of any of the rules and regulations of the board governing examinations shall be sufficient cause for the board to refuse a license (*ib.*, s. 3).

The board may refuse to issue certificates to individuals who have been convicted of the practice of criminal abortion, or who have by false or fraudulent representation obtained or sought to obtain practice in their profession, or by false or fraudulent representation of their profession have obtained or sought to obtain money or any other thing of value, or who advertise under names other than their own, or for any other unprofessional or dishonorable conduct;[3] and the board may revoke such certificates for like causes.[4] No certificates shall be revoked or refused until the holder or applicant shall be given a hearing before the board (*ib.*, s. 6).[5]

obtain liquor to be drunk as a beverage. Town of Carthage *v.* Buckner, 4 Ill. App., 317.

[1] On mandamus to compel the issue of a license and the limits of judicial and discretionary power, in the analogous case of dental examiners, see Illinois State Board of Dental Examiners *v.* People *ex rel.* Cooper, 123 Ill., 227.

[2] Unregistered dentists not allowed to collect for services. Patrick *v.* Perryman, 52 Ill. App., 514.

In a negligence case plaintiff could not be legally liable to an unlicensed physician for services, and therefore could not recover from the defendant therefor. City of Chicago *v.* Honey, 10 Ill. App., 535. See note 3, p. 236, *supra.*

[3] Unprofessional and dishonorable conduct includes making statements and promises with reference to the treatment and cure of the sick and afflicted, calculated to deceive and defraud the public. People *v.* McCoy, 125 Ill., 289.

[4] The State board of health has not the power to discipline the holders of certificates issued prior to July 1st, 1899, nor to revoke such certificates. State Board of Health *v.* Ross, 191 Ill., 87; affirming 91 Ill. App., 281.

The provision for revocation of certificates did not apply to ten-year practitioners; they were licensed by the act, and not by certificate. Williams *v.* People, 121 Ill., 84; see also Williams *v.* People, 17 Ill. App., 274.

[5] Section 6, respecting revocation

RECORDING.—The certificate must be recorded in the office of the clerk of the county in which the holder resides or practises within three months from its date, and the date of recording indorsed. Until recorded, the holder shall not exercise the rights and privileges conferred. A person practising in another county must there record his certificate in like manner (*ib.*, s. 4).[1]

DEFINITION.—"Practising medicine" is defined as treating, or professing to treat, operating on, or prescribing for any physical ailment or physical injury to or deformity of another.[2] The section does not apply to the administration of

of certificates, applies to certificates issued under the act. State Board of Health *v.* Ross, 191 Ill., 87.

Under the Act of 1877 it was held that the State board of health could revoke certificates for the same reason that they might refuse them, viz., for unprofessional or dishonorable conduct, but not from caprice or without cause, where the certificate had been fairly issued. The right of the citizen to practise his profession is too important to be taken away without reasonable cause; it must be for an act that in the common judgment is deemed unprofessional or dishonorable conduct; and revocation cannot be sustained if it does not appear that the board found the holder guilty of any act or conduct unprofessional or dishonorable. People *v.* McCoy, 125 Ill., 289.

Whether or not the practice of medicine is property, it is a valuable franchise, and it cannot be taken away without an opportunity, by timely notice, to defend. People *v.* McCoy, 125 Ill., 289.

An order revoking a certificate, without notice and without a finding of guilty upon evidence, is unauthorized and void. People *v.* McCoy, 125 Ill., 289.

There can be no recovery of the penalty for practising without a certificate where it appears from the evidence that the act of the board in revoking the certificate was unauthorized and void. People *v.* McCoy, 125 Ill., 289.

[1] Section 4 applies to certificates issued under the act. State Board of Health *v.* Ross, 191 Ill., 87.

[2] To fit spectacles to the eyes of persons of defective vision and to sell them to such persons is not treating, operating upon, or prescribing for any physical ailment, injury, or deformity, under section 7; nor is advertising as an eye expert and inviting persons afflicted with defects of vision to call upon the advertiser, professing to treat, operate on, or prescribe for any physical ailment or physical injury to or deformity of another. [So held where the advertisement stated that the advertiser did not give medical or surgical treatment.] The advertisement stated that glasses fitted and ground by the advertiser's method benefited and had cured headaches, blurring, itching, and burning of the eyes, etc. Nor did the advertiser (who engaged in business as a travelling optician) violate section 8; he was not an itinerant vender, nor did he profess to treat diseases or deformity under that section; the mere fitting of spectacles to the eyes is not an appliance intended for the treatment of diseases or injury. People *v.* Smith, 208 Ill., 31; affirming 108 Ill. App., 499; see also s. c., 199 Ill., 20, 99 Ill. App., 22.

This statute is penal and must be strictly construed. State Board *v.* Ross, 191 Ill., 84; People *v.* Lehr, 196 Ill., 361.

Selling spectacles, testing eyes, and fitting glasses is not practising medicine or surgery or professing to cure or treat diseases or deformities. People *v.* Smith, 208 Ill., 31; affirming 108 Ill. App., 499.

A person offering to sell a device, called oxygenor or perfected oxygenor king, designed to be attached to the wrist or ankle of one suffering

domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry or pharmacy; and the act does not apply to surgeons of the United States army, navy, or marine hospital service in the discharge of official duty, nor to any person who ministers to or treats the sick or suffering by mental or spiritual means without the use of any drug or material remedy (*ib.*, s. 7).

ITINERANT VENDER.—An itinerant vender of drug, nostrum, ointment, or appliance intended for treatment of diseases or injury, or professing by writing, printing, or other method to cure or treat disease or deformity by drug, nostrum, or application, must pay a license fee of $100 per month into the treasury of the board. The board may issue or for sufficient cause refuse such license. Such itinerant vender who shall by writing or printing or any other method profess to cure or treat disease or deformity by any drug, nostrum, or appliance without a license, is guilty of a violation of this section (*ib.*, s. 8).[1]

pain, and claimed to generate oxygen and introduce it into the body, was not *practising medicine* under or in violation of the law. Nor, if *oxygenor* was an *appliance* under the act, did accused violate section 8, it not being shown that he was an itinerant vender. People *v.* Lehr, 196 Ill., 361; affirming 93 Ill. App., 505.

The statute defines the practice of medicine; whether one is practising medicine is not the subject of expert opinion. People *v.* Lehr, 196 Ill., 361.

Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and as such administering osteopathic treatment; the one falls within the profession of a trained nurse, the other does not. People *v.* Gordon, 194 Ill., 571.

The right to prescribe medicines for the cure of disease and to administer them falls within the practice of medicine; the regulation of the sale of drugs and nostrums by itinerant venders falls within the purpose of the act (former Act 1887), as expressed in its title. People *v.* Blue Mountain Joe, 129 Ill., 370.

The Act of 1899 does not include those who merely advertise, puff, or sell mechanical instruments or devices, though they profess their use will cure human ills. People *v.* Lehr, 93 Ill. App., 505.

MASSAGE is practising medicine within the meaning of the act; it is a material remedy, and is not a mental or spiritual means. People *v.* Jones, 92 Ill. App., 447; so also under Act 1887, osteopathy, Eastman *v.* People, 71 Ill. App., 236; massage, Jones *v.* People, 84 Ill. App., 453.

Osteopathy is within the provisions of the law (so held of the law of 1887), and the practitioner is liable to the penalty for practising without a license. *Ob. dic.:* Conducting Turkish baths is not. Eastman *v.* People, 71 Ill. App., 236; cf. People *v.* Gordon, 96 Ill. App., 456 for *ob. dic.* that if Gordon (a magnetic healer) was guilty, then one not a licensed physician could not conduct a Turkish bath; and then the Supreme Court (194 Ill., 560) decided that Gordon's practice violated the act.

A druggist who held himself out as a "doctor," and who treated an injury, practised medicine within the meaning of the law (so held in an action for malpractice). Matthai *v.* Wooley, 69 Ill. App., 654.

[1] See *supra*, People *v.* Lehr, note.

EVIDENCE.—The plaintiff offered

PENALTY.—Practising medicine or surgery, or treating human ailments without a certificate, or violating section 8, is punishable by a forfeiture of $100 for the first offence, and $200 for each subsequent offence;[1] filing or attempting to file as his own, the diploma or certificate of another, or a forged affidavit of identification, is a felony, punishable with fine and imprisonment as forgery (*ib.*, s. 9).

On conviction of either of the offences mentioned in the act, the court must, as a part of the judgment, order the defendant to be committed to the county jail until the fine and costs are paid; and on failure to pay immediately defendant shall be committed for first offence not more than thirty days, and for each subsequent offence not more than ninety days (*ib.*, s. 10). Appeals are provided and regulated by this section (s. 10).[2]

PRACTISING IN THE NAME OF ANOTHER.—It is unlawful for any physician to practise within the State in the name of another physician, or to hold himself out as another physician by advertisements, bills, posters, or otherwise for the purpose of imposing upon or defrauding any other person (Law 1901, p. 237, s. 1; Jones & Addington's Supp., 1902, p. 830).

PENALTY for violating provisions Act 1901, p. 237, fine not less than $500 for first offence; imprisonment for six months in county jail of county where it is committed, for each subsequent offence (*ib.*, s. 2).

EXCEPTIONS.—Section 9 does not apply to physicians who hold unrevoked certificates from the State board of health, issued prior to the time of taking effect of this act (*ib.*, s. 9).[3]

to show that defendant had men travelling with him to make sales of his medicine, and professed that he could cure diseases by the use of his medicine, and that he sold his medicines for the cure of such diseases. This evidence was admissible under the former law (section 11). People *v.* Blue Mountain Joe, 129 Ill., 370.

[1] In prosecutions under the act, license or due qualification is not presumed; it rests with the defendant to prove it. Williams *v.* People, 20 Ill. App., 92. See this case for form of indictment.

[2] APPEAL—NATURE OF PROCEEDING.—Under the former law (Act of 1887) the proceeding for the recovery of the penalty was a civil proceeding, and the People might appeal. People *v.* Blue Mountain Joe, 129 Ill., 370.

Practice on appeal, where the validity of the statute was in question, see Williams *v.* People, 118 Ill., 444.

[3] Section 9 excludes physicians holding certificates issued prior to July 1st, 1899. State Board of Health *v.* Ross, 191 Ill., 87.

A provision exempting from the operation of the act those who had practised medicine in the State for ten years did not confer on them any special privilege, immunity, or franchise; it left them as it found them. Williams *v.* People, 121 Ill., 84.

FEES.—To county clerk, usual fee for making record (*ib.*, s. 4).

To State board of health, for examination in medicine and surgery, $10 (*ib.*, ss. 2, 5); and for certificate, if issued, $5 (*ib.*, s. 5). For examination in midwifery, $5; and for certificate, if issued, $3. For all other practitioners, for examination, $10; for a certificate, if issued, $5 (*ib.*, s. 5).

INDIANA.

STATE BOARD OF MEDICAL REGISTRATION AND EXAMINATION; ITS POWERS, AND THEIR EXERCISE.—The governor appoints board of five members; no school[1] or system of medicine shall have a majority representation on such board. The board shall be non-partisan and not more than three shall be members of any one political party; they are selected from reputable physicians in the State who are graduates of any college of medicine of good repute; no professor or teacher in a medical college shall be appointed a member; each of the four schools or systems of medicine having the largest numerical representation in the State shall have at least one representative on said board (Act 1897, c. 169, s. 4). The board is required to hold regular meetings on the second Tuesday in January and July, and as often in addition as may be necessary for the transaction of business (*ib.*, s. 5, as amd. Act 1901, c. 291, s. 2).[2] The secretary of the board is required to keep a record of all applications for certificates, and such records shall contain all the facts set forth in such application, including the action of the board thereon (*ib.*) (See Appendix, p. 689.)

ENFORCEMENT OF THE ACT—PROSECUTIONS.—The board is charged with the enforcement of the act,[3] and on the complaint of the board the prosecuting attorney must prosecute violations. The grand jury of the proper county must investigate all violations of the act and return indictments[4] in proper cases; and

It did not leave ten-year practitioners subject to no regulation, thereby regulating merely a class; the ten-year period was the prescribing of one qualification. *Ib.*

[1] All the sections of the act must be read together. State *v.* Webster, 150 Ind., 607.

[2] The statute of 1901 has a sufficient title. Parks *v.* State, 159 Ind., 211.

[3] The board is not a judicial body. State *v.* Webster, 150 Ind., 607.

[4] The offence is purely statutory; it is sufficient if the indictment or information charge the offence in the language of the statute or in terms sub-

the prosecuting attorney must prosecute violations by information[1] whenever a proper affidavit is filed by any one, as in other cases of violation of the law; or to prosecute offenders before the justice of the peace in proper cases (*ib.*).

PROCEEDINGS OF, AND BY, AND BEFORE THE BOARD.—The board shall from time to time establish and record in a record a schedule of the minimum requirements which must be complied with by applicants for examination for license to practise medicine, surgery, and obstetrics[2] before they shall be entitled to receive a license. The board shall also establish and cause to be recorded a schedule of the minimum requirements and rules for the recognition of medical colleges, so as to keep these requirements up to the average standard of medical education in other States. After 1897 no change shall be made in such schedules in any year after January, nor shall any change have a retroactive effect nor affect students theretofore matriculated. Such record shall be open to examination by the public, and the schedules of requirements and all changes shall be printed in circular form and mailed to all medical colleges in the State, and furnished to any person on application. Said board in establishing said schedule shall not discriminate for or against any school or system of medicine,[3] nor shall it prescribe what

stantially equivalent thereto. Parks *v.* State, 159 Ind., 211; Benham *v.* State, 116 Ind., 112; Eastman *v.* State, 109 Ind., 279.

The acts, many or otherwise, which enter into the offence constitute but one substantive offence of practising medicine, surgery, or obstetrics without a license; the acts need not be specially described in the indictment or information. Parks *v.* State, 159 Ind., 211.

The indictment is sufficient which charges the offence in the language of the statute; it is a statutory offence. Benham *v.* State, 116 Ind., 112.

Charging the offence in the language of the statute is sufficient. Eastman *v.* State, 109 Ind., 278.

[1] On demurrer to *information*, see State *v.* Green, 112 Ind., 462.

(Under the former Act of 1885) the provision that previous practice and residence within the State, with other qualifications, should entitle such practitioner to practise was not a grant of a *privilege* or *immunity*. State *v.* Green, 112 Ind., 462.

A license, declared by the act (a former act) to be void, if procured by fraud, is not void until judicially so declared in a proper proceeding for the purpose. State *v.* Green, 112 Ind., 462.

Information, in the nature of a *quo warranto*, was not the proper procedure for revoking a license obtained by fraud (under the Act of 1885). State *v.* Green, 112 Ind., 462.

[2] The State has not denied the right to seek to relieve by manipulating or kneading diseased or affected parts, with or without hypnotic suggestion, but the right to do the acts denominated by statute *engaging in the practice of medicine*, without the required certificate. Parks *v.* State, 159 Ind., 211.

[3] When intelligent and educated men differ in theories, the legislature cannot condemn one or approve an-

system or systems or schools of medicine shall be taught in any of the colleges, universities, or other educational institutions of the State. The board shall have power to establish necessary rules for the reciprocal recognition of certificates issued by other States, and to prevent unjust and arbitrary exclusions by other States of graduates in medicine from this State who have filled its requirements. When an application for a certificate is made and a diploma submitted, the board shall determine[1] on the evidence presented whether such diploma belongs to and was issued to the applicant, and whether the medical college that issued the diploma maintains a standard of medical education conforming to that fixed by the board, and whether the application complies with the rules of the board.[2] If these facts be shown by competent evidence, the board must issue a certificate stating that the person applying for such certificate and possessing such diploma is entitled to a license to practise medicine, surgery, and obstetrics in Indiana, provided the application be filed prior to January 1st, 1905, and the applicant shall have, prior to January 1st, 1901, matriculated in a reputable medical college in Indiana, maintaining a standard of medical education conforming to that fixed by the board, and shall have graduated from said college and received his diploma therefrom, prior to January 1st, 1905. Except as last above provided, no certificate shall be issued to any person until he shall have satisfied the board that he has graduated at a reputable medical college[3] as in this section set forth, maintaining a standard of medical education as above prescribed, and shall have passed

other, but it may require learning and skill in the school of medicine the physician professes to practise. Eastman *v.* State, 109 Ind., 278.

[1] If the board should refuse to act on an application, action can be compelled; but the board must act after investigation, and then grant or refuse the application as may be found right. State *v.* Webster, 150 Ind., 607.

When an application for a certificate is filed with the board, it is an *ex parte* proceeding. *Re* Coffin, 152 Ind., 439.

In acting on an application the board is entrusted by the people with the exercise of the police power of the State for their protection. *Re* Coffin, 152 Ind., 439.

By reason of the people's interest in the subject matter, prosecutors and courts cannot let these proceedings, *ex parte* in form, become *ex parte* in fact. *Re* Coffin, 152 Ind., 439.

[2] The Act of March 8th, 1897, by implication, revoked all former licenses; one who applies for a new license takes notice of the action of the board on his application. State *v.* Webster, 150 Ind., 607.

[3] The requirement of an affidavit showing graduation from a reputable medical college and the exhibition of a diploma to the clerk is not unconstitutional (so held of Act of 1885). State *v.* Green, 112 Ind., 462.

before the board a satisfactory examination as to his qualifications to practise medicine, surgery, and obstetrics.[1] Such examination shall be had on the payment of the same fees and upon the same terms and conditions as provided in section 1 of Act March 8th, 1897, but the applicant shall have the right to designate, in writing, at the time he files his application, the member of the board who shall conduct his first examination in materia medica, therapeutics, theory and practice of medicine, surgery, obstetrics, and gynæcology (*ib.*). The board at its discretion may authorize the secretary to issue a temporary permit to an applicant for the interim from date of application until the next regular meeting of the board. The board may review the evidence on which a license has been obtained, and if found that a license has been obtained by fraud or misrepresentation, the board may revoke it.[2] The board may refuse to grant a certificate to any person guilty of felony or gross immorality or addicted to the use of liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery,[3] and may, after notice and hearing, revoke a license and the certificate upon which it has been or may be issued for like cause.[4] A spe-

[1] It was part of the *common law* that physicians must possess learning and skill (citing Bonham's case, 8 Coke R., 227; College of Physicians *v.* Levett, 1 Ld. Raym., 472). Eastman *v.* State, 109 Ind., 278.

[2] Section 5, respecting revocation, has no application to licenses issued under a former act. State *v.* Webster, 150 Ind., 607. See note 2, p. 245.

[3] Under section 2 an old license is *prima facie* evidence of the right to a new one; but the board may inquire whether the former license was rightfully obtained, or may refuse a certificate to the holder of an old license if the applicant is unfit to practise by reason of criminal conduct or immoral character or habits. After the giving of the certificate and before the issue of a license, the board may, after notice and hearing, revoke the same. To protect the applicant from injustice, there is an appeal to the circuit or superior court of the county of the applicant's residence. State *v.* Webster, 150 Ind., 607.

The former license does not necessarily entitle the holder to a certificate from the board, unless the board is satisfied upon examination that the license was obtained without fraud or misrepresentation, and, besides, that the applicant was morally a fit person to engage in the practice of medicine. State *v.* Webster, 150 Ind., 607.

The statute itself is notice that the legislature has set aside old licenses; the applicant for a new license is held to have notice of whatever disposition the board may make of his application. State *v.* Webster, 150 Ind., 607.

It is within the power of the legislature to take away the right to practise from persons lawfully engaged therein who may be deemed insufficiently qualified in the judgment of the board or official to whom the examination of the applicant has been entrusted. State *v.* Webster, 150 Ind., 607.

[4] The provision of section 5, for revocation, has no application to a license granted under a former law; such license was revoked by section 1; a new license can be issued in its

cific written charge verified by affidavit must be presented to the board, making definite and specific charges of such facts against the holder of such license. Thereupon the board shall fix a time and place for hearing such charges, at which the person charged may appear and defend. A copy of the charges, with notice of time and place of hearing, must be served on the person charged, at least twenty days before the time for hearing. If the board revokes the certificate and license, it shall enter the order on its record. A copy of the order, certified by the secretary of the board, shall be by it at once delivered to the clerk of the circuit court of the county in which the license was issued; and such clerk shall record the same on the margin of the record of the license. If the board refuse to grant a certificate for any reason above stated, it shall enter its refusal on its record, with a statement of the grounds (*ib.*). An appeal may be taken from the action of the board to the circuit or superior court of the county in which such license was issued, in case of revocation, and to the county where the applicant lives in case of refusal of a certificate, upon the licensee or applicant filing a bond in $200, to be approved by the clerk, to secure costs of the appeal. It is then the duty of the clerk to notify the board, which forwards to the clerk the charges and a copy of its order, or the application and order of refusal.[1] The clerk of the court shall docket the same as a cause pending in the court. The charge shall be treated as a complaint. The accused may plead to the charges and issues may be formed thereon as in any civil case, and it shall be tried by the judge of the circuit court, and sum-

place only as set forth in the act. State *v.* Webster, 150 Ind., 607.

Under section 5 (before the amendment of 1901) the board could revoke its own certificate before the issue of a license thereon, but the license, when issued thereon, could only be revoked on the finding and judgment of a court. State *v.* Webster, 150 Ind., 607. [This prerequisite is now unnecessary, because of the new provisions of the amendment of 1901.] See State *v.* Green, *supra*, note 1, p. 244.

Form of petition to Court for revocation of license on ground of misrepresentation and fraud (under former law). See Curryer *v.* Oliver, 27 Ind. App., 424.

[1] On appeal, the duty which rested on the board on the application devolves on the prosecuting attorney. *Re* Coffin, 152 Ind., 439.

A court cannot permit cases of this kind to be terminated by agreement of an interloper (claiming to act in behalf of a prosecuting attorney). *Re* Coffin, 152 Ind., 439.

An entry of judgment in favor of applicant *by agreement* is in violation of law, and will be set aside on motion of the attorney general. *Re* Coffin, 152 Ind., 439.

It will be presumed that the action of the board was right, till reversed on appeal. *Re* Coffin, 152 Ind., 439.

mons shall issue to the accused as in ordinary civil cases. The accused may appear and plead to said charge and issues may be formed thereon as in civil cases and tried by the judge of said court. The prosecuting attorney of the circuit shall appear in such causes and represent the board. The only finding and judgment shall be guilty or not guilty as to each charge. The judgment shall be certified to the board by the clerk of the court, if the finding is not guilty as to each charge; and the board must then make an order setting aside its order of revocation, and forward to the clerk of the court a certified copy thereof, which shall be entered on the margin of the record of said license. If judgment of guilty is awarded on any charge, the costs shall be recovered from the accused and a fee of $10 taxed in favor of the prosecuting attorney (*ib.*), and the order of revocation shall remain in effect. During the pendency of the appeal the accused is not entitled to practise by virtue of his license.

Where the appeal is from a refusal to grant a certificate, it is heard on the application and a certified copy of the order of refusal, without any other issues; is tried by the judge of the court, who, upon his finding, enters judgment that the license shall or shall not be issued, as the facts may require; and on such order the clerk issues the proper license, showing the authority on which it is issued, and reports the same to the State board. The prosecuting attorney represents the board on the appeal, and, if the court refuses the license, judgment is entered against the applicant for costs, including $10 to the prosecuting attorney. Appeals may be prosecuted to the Supreme Court by the board or the applicant or holder of license, as in other civil cases (*ib.*). [The section further regulates the practice on such appeal, in details unnecessary here.]

QUALIFICATION.—It is unlawful to practise medicine, surgery, or obstetrics without a license (Acts 1897, c. 169, s. 1).[1]

[1] In an action for malpractice, it is not error to omit to instruct the jury that a physician must have a license to practise. Aspy *v.* Botkins, 160 Ind., 170.

This law does not violate the privileges or immunities of citizens of the United States. Parks *v.* State, 159 Ind., 211.

The State has the right, in exercise of the police power, to pass a reasonable law to regulate the practice of medicine. Parks *v.* State, 159 Ind., 211; State *v.* Webster, 150 Ind., 607, 41 L. R. A., 212; Dent *v.* W. Va., 129 U. S., 114.

The legislature is the appropriate tribunal to determine the degree of

Any person desiring to begin the practice of medicine, surgery, or obstetrics shall procure [1] from the State board of medical registration and examination a certificate that he is entitled to a license, and shall submit to said board his diploma, with an affidavit [2] setting forth the time and number of terms, duration of

learning that those who gain a livelihood by seeking to relieve the bodily ailments of others should possess. Parks *v.* State, 159 Ind., 211.

The statute contains no arbitrary or unreasonable deprivation of right. Parks *v.* State, 159 Ind., 211.

It is not for the courts to say whether the law is a wise one; it is a question for the legislature whether men should be as free to choose a minister to the body as to the soul, or whether such laws repress independent investigation and retard the progress of medical knowledge, or that many valuable medical discoveries were made in spite of the prejudice of men learned in the old and time-tested lore of their day, or whether such laws are out of harmony with free institutions; so long as the act is not clearly in violation of any provision of the constitution it cannot be held invalid. State *v.* Webster, 150 Ind., 607.

For a collation of the decisions in the United States on the constitutionality and validity of medical and other similar statutes for licensing the practice of professions, see State *v.* Webster, 150 Ind., at p. 617.

The General Assembly, under the police power of the State, can require a license as a preliminary to the practice of medicine, surgery, or obstetrics. State *v.* Green, 112 Ind., 462.

The question whether the act is wise, or *reasonable*, or *unreasonable*, is a legislative one. Eastman *v.* State, 109 Ind., 278; see also Mayfield *v.* Nale, 26 Ind. App., 240.

The statute (so held of Act of 1885) does not deny to any person, of any age, sex, race, color, or residence, the right or privilege, if such it be, to obtain a license, if possessed of the requisite statutory qualifications. State *v.* Green, 112 Ind., 462.

The right to practise, secured by a license, is not a *franchise;* a *franchise* is incapable of existing without a grant from the sovereign authority; the right to practise a profession is not a franchise. State *v.* Green, 112 Ind., 462.

One who practises without a license cannot recover for his services. Orr *v.* Meek, 111 Ind., 40.

The statute is an exercise of the police power. Eastman *v.* State, 109 Ind., 278.

It is the intention of the statute to keep out all who do not possess learning and skill sufficient to enable them properly to discharge the duties of members of the professions; courts have no right to create exceptions which will defeat that intention. Eastman *v.* State, 109 Ind., 278.

In filing a claim against an estate for medical services, it is not necessary to allege that claimant was a regularly licensed physician at the time the services were rendered. Cooper *v.* Griffin, 13 Ind. App., 212.

The practice of medicine, surgery, and obstetrics is not absolutely forbidden by the act (1885); it operates, not against the profession, but those who undertake to practise it. Cooper *v.* Griffin, 13 Ind. App., 212.

The decisions as to the burden of proof, in other States, are not harmonious. Cooper *v.* Griffin, 13 Ind. App., 212

Under the Indiana statute (1885) a physician attempting to recover from a decedent's estate for services must prove that he had taken out a license. Cooper *v.* Griffin, 13 Ind. App., 212.

A complaint by a physician to recover for services rendered is insufficient if it fails to allege a license to practise. Bedford Bell Reg. Co. *v.* McDonald, 12 Ind. App., 620.

[1] A licensed physician is not compelled to render medical assistance, and is not liable in damages for a refusal resulting in death. Hurley *v.* Eddingfield, 156 Ind., 416.

[2] See note 3, p. 245.

each term, applicant was required to be in attendance at said school in order to complete said course of study, and that affiant is the person to whom such diploma was issued, accompanied by the affidavit of two freeholders resident in the same county in which the applicant resides, stating that the applicant is the person named in the accompanying diploma and application for a certificate.

All diplomas shall be returned by the board to the owner; for failure, the secretary shall be liable on his bond for damages in sum of $25. If a diploma is presented from a medical college not recognized as maintaining a sufficiently high grade or standard of medical education as defined and fixed in the records of the board, the applicant may be examined as to his qualifications to practise medicine, surgery, and obstetrics in such manner as the board shall provide. If he pass satisfactorily to the board he shall receive a certificate, the same as if he had presented a satisfactory diploma and other evidences of qualifications for the practice of medicine; if he fail he may submit to another examination within twelve months. A person failing to pass examination may appeal to the circuit or superior court of the proper county, requiring the board to show cause why he should not be permitted to practise medicine, surgery, or obstetrics, on giving bond to secure costs (*ib.*, s. 2, as amended, Act 1899, c. 145).

LICENSE.[1]—On receipt of the certificate the applicant shall receive, on its presentation to the clerk of the county[2] in which he resided, from said clerk, a license to practise medicine,[3] surgery, and obstetrics in the State (*ib.*).[4]

In case of change of residence from one county to another, the holder of a license shall obtain a new license in the county where he proposes to reside, by filing with the county clerk the license obtained by him in the county in which he last resided (*ib.*).[5]

[1] The law was framed, not to bestow favors, but to protect citizens. Eastman *v.* State, 109 Ind., 278.

[2] The act (of 1885) does not confer on a county clerk judicial powers. Eastman *v.* State, 109 Ind., 278.

It is a presumption that the clerk properly discharges his duty. Curryer *v.* Oliver, 27 Ind. App., 424.

[3] See note 1, p. 249.

[4] See note 1, p. 248.

[5] (Under the Act of 1885) a physician must take out a license in each county in which he practises; it may be that this does not apply in case of an emergency demanding prompt action, or a professional visit for consultation, or a call because of some special skill or ability in a particular branch; but where a physician regu-

The county clerk on presentation of such certificate shall issue a license in the form prescribed,[1] and shall enter of record the name, age, place, and birth of the applicant, his address and the school or system of medicine to which applicant belongs; and the person registering shall subscribe to and verify by oath before such clerk an affidavit concerning such facts (Act 1897, c. 169, s. 3).

FORMER PRACTITIONERS.—The law made provision for the license of former practitioners who had not complied with the former law, on application on or before July 11th, 1899 (*ib.*, s. 2, as amended, c. 145, laws 1899).[2]

FORMER MIDWIVES.—The act made provision for a certificate and licensing of former practitioners of midwifery, on application on or before July 11th, 1899 (*ib.*, s. 6, as amended, Act 1899, c. 145, s. 4).

MIDWIVES.—Persons desiring to enter into the practice of midwifery shall present to the State board of medical registration and examination their diplomas duly attested and procured from an obstetrical school of such standing as shall be recognized and determined by the board. Such applicant shall pay to the board $5 at the time of making the application, or shall submit to an examination in midwifery as the board shall require, and

larly practises his profession as in ordinary cases, he must obtain a license in the county where he so practises. Orr *v.* Meek, 111 Ind., 40.

Exceptions cannot be created by the courts where the words of the statute are free from ambiguity and its purpose plain. Eastman *v.* State, 109 Ind., 278; Mayfield *v.* Nale, 26 Ind. App., 240.

A licensed practitioner removing to another county to reside must obtain a license in the county to which he removes, before he can there lawfully practise or recover compensation for professional services rendered there. Mayfield *v.* Nale, 26 Ind. App., 240.

[1] The form of license prescribed by the statute is an essential and controlling part of the statute. Mayfield *v.* Nale, 26 Ind. App., 240.

[2] Under sections 2 and 5 the former license is only *prima facie* evidence of the right to a new one. State *v.* Webster, 150 Ind., 607.

The Act of March 8th, 1897, denying to practitioners the right to continue practice without compliance with the statute was constitutional, as within the police power. State *v.* Webster, 150 Ind., 607. See note 3, p. 246.

An old license under the former law remained in force only until the board acted on an application for a new license; if the new license was granted, it took the place of the old; if refused, the applicant has no right to practise medicine unless on appeal the board is required to issue a license. State *v.* Webster, 150 Ind., 607.

In declaring that in its opinion physicians and surgeons who had practised within the State for a specified period were as well qualified to continue to practise it as a recent graduate to commence, the legislature violated no constitutional principle. State *v.* Green, 112 Ind., 462.

pay a fee of $10. Such evidence of qualification being satisfactory to the board, it shall issue a certificate entitling the holder to a license from the clerk of the county in which the applicant resides, which license shall entitle the holder to practise midwifery in the State. The license shall conform to all requirements of registration imposed on physicians' licenses under section 2, and shall be subject to revocation for the same cause as provided in section 5 in case of license to physicians (*ib.*, s. 6, as amended Act 1899, c. 145, s. 4).

OFFENCE.—Making wilfully false affidavit under section 3, is perjury (Act 1897, c. 169, s. 3). See *Penalty, infra.*

PENALTY.—Practising medicine, surgery, or obstetrics without a license duly issued as provided in the act is a misdemeanor, punishable with a fine of from $25 to $200 (*ib.*, s. 9).[1]

In case of judgment of guilty under section 5, the board may revoke the license, the costs shall be recovered from the accused, and a fee of $10 taxed in favor of the prosecuting attorney (*ib.*, s. 5, as amended 1899, c. 145, s. 2).

EXEMPTIONS.[2]—Nothing in the act shall be construed to discriminate against any school or system of medicine, or to prohibit gratuitous services in cases of emergency,[3] or the administration of family remedies. It shall not apply to any commissioned officer of the United States army, navy, or marine hospital service in the discharge of his official duties, nor to any physician or surgeon who is legally qualified to practise in the State or Territory in which he resides when in actual consultation with a legal practitioner of this State, nor to any physician or surgeon residing on the border of a neighboring State and duly authorized to practise under the laws thereof, whose practice extends into the limits of this State, provided such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of this State. This act shall

[1] In a prosecution under the act the burden of proof is on the defendant to show that he was duly licensed. Benham *v.* State, 116 Ind., 112. See Cooper *v.* Griffin, p. 249, note.

[2] See note 5, p. 250; and Eastman *v.* State, p. 249, note.

[3] A physician called from an adjoining State in consultation with an attending physician to amputate a leg, in a case of emergency, is entitled to recover for that service without a license in the State of Indiana; such an exception being one which the courts, from considerations of humanity, are empowered to incorporate in the construction of statutes; but he could not recover for attendance subsequently to dress the amputated limb, no such emergency existing in the latter case. Board of Commissioners *v.* Cole, 9 Ind., 474.

not be construed to prevent medical students from practising medicine and surgery under the immediate and direct supervision of a licensed physician for a limited period of two years, provided said student had not practised medicine, surgery, or obstetrics prior to the passage of this act (original act March 8th, 1897; amending act March 3d, 1899); in that event the amount of time said student has practised medicine, surgery, or obstetrics shall be deducted from said two years. In no event shall said student open an office or offer to engage in the practice of medicine, surgery, or obstetrics (*ib.*, s. 7, as amended 1899, c. 145, s. 5).

DEFINITION.—To open an office for *such purpose*, or to announce to the public in any way a readiness to practise medicine [1] in any county of the State, or to prescribe for, or to give surgical assistance to, or to heal, cure or relieve, or to attempt to heal, cure or relieve those suffering from injury or deformity, or disease [2] of mind or body, shall be to engage in the practice of medicine within the meaning of the act [3] (*ib.*, s. 8); or for any one to use in connection with his or her name the words or letters "Dr.," "Doctor," "Professor," "M.D.," or "Healer," or any other title, word, letter, or designation intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches (*ib.*).

[1] See note 2, p. 244.

[2] Whether the *opium habit* is a *disease* or a vice is a question of fact and not of law [so held in the case before the Court]; but be that as it may, the accused, in his treatment of the habit and those who were morbidly addicted thereto, held himself out to the world as a physician and practised medicine within the meaning of the act. So held where he issued circulars signed "Dr.," and claimed that his *treatment* of his *patients* would effect a complete *cure*. Benham *v.* State, 116 Ind., 112.

[3] If a man holds himself out to the community as a person skilled in the science of healing and on that ground seeks the opportunity to exercise the skill he claims to possess, his business becomes impressed with a public character, and he is therefore subject to reasonable regulation in its prosecution. Parks *v.* State, 159 Ind., 211.

For discussion of sound legal and constitutionally permissible reasons which might fairly have directed the judgment of the legislature in confining even magnetic healing to licensed practitioners (*ob. dic.*, so also of hypnotism, p. 226), see Parks *v.* State, 159 Ind., at p. 235.

It is immaterial whether the person who treats diseases or wounds does it for hire or not (so said under Act 1885); the law applies to all who assume the duty of treating sick, wounded, or injured citizens, as well those who expect compensation as those who do not. Eastman *v.* State, 109 Ind., 278.

A person who practised magnetic healing, who did not use medicine or surgery, who held himself out and advertised as a magnetic healer, and styled himself "Professor," who diagnosed cases, and gave treatment consisting, so far as there was anything manual, in holding the afflicted

EXCEPTIONS.—Nothing in the act is construed to apply to or limit in any manner the manufacture, advertisement, or sale of proprietary medicines (*ib.*); nor to non-itinerant opticians[1] at this time (March 11th, 1901) engaged in, or who may hereafter engage in, the practice of optometry in the State; nor to professional or other nurses (*ib.*).

INDICTMENT, ETC.—In charging any person in an affidavit, information, or indictment with violating this law by practising medicine, surgery, or obstetrics without license, it is sufficient to charge that he did upon a certain day and in a certain county engage in the practice of medicine, he not having any license so to do, without averring any further or more particular facts concerning the same (*ib.*).[2]

FEES.—To board at time of application, $10 for certificate (*ib.*, s. 2, as amended c. 145, laws 1899).

From applicant for examination under section 2, $25, which entitles him to re-examination in case of failure at first or any subsequent examination (*ib.*).

To county clerk, for issuing and recording license fifty cents (*ib.*).

To prosecuting attorney on judgment of guilty under section 5, $10 (*ib.*, s. 5, as amended 1899, c. 145, s. 2).

Midwives, on application, to State board, $5, or on examination $10 (*ib.*, s. 6, as amended 1899, c. 145, s. 4).

OSTEOPATHY.[3]—The board may grant limited certificates, authorizing the proper clerk to issue to the holder a license to practise osteopathy only. Such certificates shall be issued on the same terms and conditions as others, except that the applicant shall not be required to pass an examination in materia medica, nor shall the college from which he presents a diploma be required to conform to the standard fixed by said board as to instructions in materia medica, but such college shall so conform in all other branches of instruction. Such license shall not

parts and rubbing them, and who charged and received money for his services, all without a license, violated the Act of 1901, p. 475, s. 8. Parks *v.* State, 159 Ind., 211.

[1] Nor is it an arbitrary discrimination to except physicians of other States, there duly licensed, in consultation with local physicians, or whose practice extends into the State, or opticians, or professional or other nurses; there are substantial reasons (discussed in the opinion) for each of these discriminations; nor is there an arbitrary discrimination in favor of osteopathy; the classification is based on mental competency. Parks *v.* State, 159 Ind., 211.

[2] See note 4, p. 243.

[3] See note 1, p. 254.

authorize the holder to administer, prescribe, or use on one other than himself any drugs or medicines, and any such administration, prescription, or use of any drug or medicine by such person shall be practising medicine without a license, and such person shall be punished therefor as others are punished for practising medicine without a license. Any person now (March 11th, 1901) holding a diploma issued from any college of osteopathy in the United States, and a resident of Indiana, shall be granted a certificate and license to practise osteopathy upon presenting his diploma to the board and clerk and paying the fee required by this act (Act 1901, c. 291, s. 4). (See Appendix, p. 689.)

Indian Territory.

Boards of Medical Examiners.—The United States judge of each district is required to appoint for his district a board of medical examiners, consisting of three citizens of the district, learned in the science of medicine and surgery, of good moral character, graduates of some reputable medical college recognized by either of the American medical college associations, who shall be registered under this act (Act of Congress, April 23d, 1904, c. 1,493, s. 4).

Meetings of each board are required to be held quarterly at the court house of the district on the first Monday of January, April, July, and October (*ib.*, s. 8).

Any two members of a board constitute a quorum (*ib.*, s. 13).

Qualification.—Hereafter no person shall practise medicine or surgery or either as a profession in the Territory without being first registered as a physician or surgeon or either, in the office of the clerk of the United States Court in the district in which he or she offers to practise (*ib.*, s. 1).

Former Practitioners.—Physicians and surgeons engaged in practice at the time of the passage of the act were required within six months to present to said board their diplomas and an affidavit that the affiant is its lawful possessor and the person named therein. Those who had no diplomas were required to submit, within the same time, sworn applications, setting forth the extent of their medical education and their experience as practitioners, and to be subjected to a careful examination by the board (*ib.*, s. 7).

Certificate of Approval of Diploma.—All physicians and surgeons holding diplomas, desiring to practise the science of medicine and surgery in the Territory, shall submit the same to the board of examiners of the district in which they desire to practise, for examination and approval, and pay $1 to the board; and upon approval of the diploma by the board shall not be required to undergo examination; and the board shall issue to the applicant a certificate of approval, which shall be registered in the clerk's office of the district in which the board holds jurisdiction. *Provided* that no person holding a diploma issued after July 1st, 1904, shall practise medicine or surgery for pay in the Territory, except the diploma be issued by a medical school or college requiring a preliminary examination for admission to its course of study in all the common branches and the higher mathematics, which requirements shall be regularly published in all the advertisements and in each prospectus or catalogue issued by said school, and shall also require as a requisite for granting the degree of doctor of medicine attendance upon at least four courses of lectures of six months each, no two to be held within one year, and having a full faculty of capable professors in all the different branches of medical education, to wit, anatomy, physiology, chemistry, toxicology, histology, pathology, hygiene, materia medica, therapeutics, obstetrics, bacteriology, medical jurisprudence, gynæcology, principles and practice of medicine and surgery, and specially requiring clinical instruction in the last two named of not less than four hours a week in each during the last two courses of lectures (*ib.*, s. 14).

Examinations.—Each board, when assembled, is required to faithfully and impartially examine all persons who appear before it for examination, touching their qualification to practise medicine and surgery or either. Those who satisfy a majority of the board that he or she is of good moral character, and duly qualified in knowledge and capacity to practise medicine and surgery or either, shall receive from such board a certificate of qualification as physician and surgeon or either, as the case may be, which entitles such person to registration under sections 2 and 3 (*ib.*, s. 8).

A person desiring to be examined at any other time than the regular meeting may notify the president of the board, who shall assemble the board to examine the applicant as soon as practicable (*ib.*, s. 10).

REGISTRATION.—Any person who may wish to practise the science of medicine or surgery or both shall be allowed to register as such, on filing with the clerk of the United States Court of any district in the Territory a certificate of qualification signed by a majority of the board of medical examiners of the district in which he or she offers to register. Any person living in a district in which no board is organized may apply to the board of some other district in the Territory (*ib.*, s. 3).

SYSTEM OF MEDICINE.—No person is excluded on account of any particular system or school of medicine that he or she may desire to practise (*ib.*, s. 8).

REFUSAL—REVOCATION OF CERTIFICATES.—The board may refuse certificates to persons guilty of unprofessional or dishonorable conduct, and may revoke certificates for like causes, after an opportunity to be heard in defence (*ib.*, s. 9).

CERTIFICATE OF REGISTRATION.—The district clerk shall give to every person registered under the act a certificate of registration, which authorizes such person to practise as physician or surgeon or both, as the case may be, in any district of the Territory, provided he or she registers the certificate with the clerk of the United States district court for each district in which he or she desires to practise (*ib.*, s. 11).

DEFINITION.—Any person who shall prescribe or administer medicine for or who shall in any manner treat disease, wounds, fractures, or other bodily injury for pay, is deemed a physician and surgeon under this act (*ib.*, s. 15).

OFFENCE—PENALTY.—Engaging in the practice of medicine and surgery, or either, in the Territory in violation of the act, is a misdemeanor; on conviction in any court having jurisdiction under the laws of the United States governing the practice of medicine and surgery in the Territory, fine $25 to $100. Each day of practice without registration is a separate offence (*ib.*, s. 16).

EXCEPTIONS.—The act does not prohibit gratuitous services in cases of emergency nor the domestic administration of family remedies; nor apply to surgeons in the service of the United States in the discharge of their official duties, nor to physicians or surgeons from other Territories or States when in actual consultation with a physician duly registered under the act.

Osteopathy, massage, Christian science, and herbal treatment are not affected by the act (*ib.*, s. 16).

FEES.—To the clerk for all his services, $1.50 in each case (*ib.*, s. 12).

To the secretary in advance from applicant for examination, to be divided equally among the members of the board, $10 (*ib.*, s. 13).

To the board for examination of a diploma, $1 (*ib.*, s. 14).

IOWA.*

*See Appendix, p. 689.

STATE BOARD OF MEDICAL EXAMINERS consists of the physicians of the State board of health. It is required to hold regular meetings in May and November and special meetings as may be necessary (Supp. Code 1902, s. 2,576).

EXAMINATIONS—CERTIFICATE.—Examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions covering anatomy, physiology, general chemistry, pathology, surgery, and obstetrics. In materia medica, therapeutics, and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practise. The examination papers are marked on a scale of 100. Each candidate must first pay to the secretary of the board a fee of $10 therefor. The average required to pass shall be fixed by the board prior to the examination. Each applicant on obtaining an order for examination receives from the secretary a confidential number, which he shall place upon his work when completed, so that the board in passing thereon shall not know by whom it was prepared. All matters connected therewith are filed with the secretary and preserved for five years as part of the records of the board, during which they shall be open to public inspection. If the examination is satisfactory to five members of the board, it shall issue its certificate, signed by its president, secretary, and not less than three other members,[1] who may in the absence of the others act as an examining board, and the different schools of medicine represented in the board of health shall be represented in said number.[2] The cer-

[1] The board is not a corporate body; it is a branch of the Government. The law does not violate s. 1, art. 8, Iowa Const., prohibiting the creation of corporations by special laws. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

[2] The statute is analogous to the statutes for the examination of teachers, applicants for admission to the

tificate while in force shall confer on the holder the right to practise medicine, surgery, and obstetrics, and be conclusive evidence thereof.[1] In examinations and proceedings under this chapter any member of the board may administer oaths and take testimony in any manner authorized by law.[2] Any one failing in his examination shall be entitled to a second one within three months thereafter without further fee. If any person shall by notice in writing apply to the secretary of the board for an examination or reëxamination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of the chapter, practise medicine

bar, and to practise pharmacy and dentistry. Iowa Ecl. Med. Coll. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

[1] The law does not grant privileges or immunities; it establishes a rule of evidence to determine qualification. The precise evidence, if appropriate for the purpose, may be established by the lawmakers. State *v.* Blair, 112 Iowa, 466; criticising State *v.* Pennoyer, 65 N. H., 113; State *v.* Hinman, 65 N. H., 103.

When the question of authority to practise arises collaterally in a civil action between a physician and one who employs him, due qualification under the statute will be presumed; the burden is upon him who denies such license. Lacy *v.* Kossuth Co., 106 Iowa, 16; citing Brown *v.* Young, 2 B. Mon., 26; City of Chicago *v.* Wood, 24 Ill. App., 42; Thompson *v.* Sayre, 1 Denio, 175.

In a public prosecution, it is the other way. Lacy *v.* Kossuth Co., *supra*.

The act contemplates that the certificate shall be the evidence of the qualification, when ascertained, and that it shall be recorded in the county where the holder resides; and the record must show the facts upon which the certificate was granted. The certificate or record is the proper evidence of qualification, and the offence consists in the practice of the profession without first procuring the certificate. State *v.* Mosher, 78 Iowa, 321 (1889).

If the law authorized an examination as to competency and the certificate was legally refused because of incompetency, the case furnishes no ground of complaint even if the law is invalid in other respects. State *v.* Mosher, 78 Iowa, 321 (1889).

A certificate is only *prima facie* evidence in favor of one accused of practising without it, because it can be revoked. State *v.* Mosher, 78 Iowa, 321 (1889).

[2] The power to administer oaths and take testimony is not exclusive (if it applies to the revocation of certificates), and does not prevent the board from considering, when no timely objection is made, an affidavit and a transcript of the minutes of a coroner's inquest. Traer *v.* State Board, 106 Iowa, 559.

The board has jurisdiction to determine the competency and sufficiency of evidence submitted to it; if it erred in admitting or giving undue weight to evidence, it cannot be corrected by *certiorari* proceedings. Traer *v.* State Board, 106 Iowa, 559.

If the act of a board is within its jurisdiction and the action was legal, it cannot be reversed on *certiorari*, though the motive was wrongful. Iowa Eclectic Medical Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

The board has power by proper investigation to determine the identity of applicants, the genuineness of their diplomas, and whether they were issued by a medical school legally organized and in good standing. Iowa Ec. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

until the next regular meeting of the board without the required certificate (Supp. to Code, 1902, s. 2,576). Every certificate must show whether it was granted upon examination [or diploma [1]] and the school of medicine the holder practises under (Code 1897, s. 2,577).

The State board of medical examiners shall examine [2] the graduates of the medical departments of the State University of Iowa and of such other medical colleges in the State as are recognized by said board as being in good and legal standing [3] at the annual medical commencement, and at the loca-

[1] The provision for granting certificates on diploma without examination was repealed by Act 1900, c. 89, s. 1, but the provision for the form of certificate was left unchanged. Provision for granting a certificate to certain graduates of medical colleges of this State, presenting certificates from the boards of other States, was introduced by Act 1904, c. 102 (*q. v.* below, p. 262).

It is not questioned that a diploma from a reputable medical school and the disclosures of an examination are of satisfactory character as proof of proper qualification; statutes which treat practice at the time of their enactment or practice for a number of years as sufficient evidence of qualification have been held invulnerable. State *v.* Blair, 112 Iowa, 466; citing State *v.* Randolph, 23 Or., 74; State *v.* Dent, 25 W. Va., 1; ex parte Spinney, 10 Nev., 323; Fox *v.* Territory, 2 Wash. T., 297; State *v.* Creditor, 44 Kan., 565; Gosnell *v.* State, 52 Ark., 228; State *v.* State Medical Board, 32 Minn., 324; State *v.* Vandersluis, 42 Minn., 129; State *v.* Green, 112 Ind., 462; People *v.* Phippin, 70 Mich., 6.

[2] The board can impute incompetence to one who is stubbornly silent to its questions. State *v.* Mosher, 78 Iowa, 321 (1889). See note 2, p. 259.

[3] The action of the board upon charges being filed, in resolving that it would not issue certificates to graduates of plaintiff college, of the class of 1889–90, until the standing of the college had been determined, was unauthorized, unjust, and arbitrary; the board having previously determined the plaintiff a college in good standing, on the faith of which the course of instruction was continued and students encouraged to attend. It deprived the graduates of the class in question of receiving certificates without investigation. It was illegal because it reversed the former action of the board without investigation or sufficient cause. Iowa Ec. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

If the act authorized the board to determine without investigation that a particular medical school was not in good standing, and especially when previously determined to be of good standing, its constitutionality might well be questioned. Iowa Ec. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

The board is not concluded by once having determined that a school is in good standing, but it has no power afterward to determine differently arbitrarily and without investigation. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

The determination need not be with the formality of a trial, but it must be based upon an inquiry and facts. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

The standing of a college under this act is what it is in respect to the thoroughness of its course, rather than what it may be reputed to be. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A. 355; 87 Iowa, 659.

It is doubtful whether the board can arbitrarily say that no more than forty-five per cent of the students may be permitted to graduate. Iowa

tion of said university and other medical colleges respectively (Code 1897, s. 2,582, as amended 1899, c. 89, s. 2; Supp. Code 1902, s. 2,582).

QUALIFICATION.[1]—After January 1st, 1899, all persons beginning the practice of medicine must submit to an examination, as set forth in this chapter, and present diplomas from medical colleges recognized as in good standing by the State board of medical examiners.[2] All persons receiving their diplomas subsequent to January 1st, 1899, shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year[3] (Code 1897, s. 2,582, as amended

Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A. 355; 87 Iowa, 659.

When the board has once acted on the facts, and within its jurisdiction, in determining the standing of a college, a court cannot reverse its determination, though it might have reached a different conclusion on the facts. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

No appeal is provided from the determination of the board on the standing of a college, but its graduates or students may submit to an examination without regard to diploma. It is not true that the board may determine the standing of a college arbitrarily and without restraint; the board acts under the restraints of law, and the courts will not presume that it will disregard those restraints, in order to hold the law unconstitutional. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

Jurisdiction to review action of board in determining standing of college. See Coll. Phys. & Surg. Keokuk *v.* Guilbert, 69 N. W. R., 453; 100 Iowa, 213.

[1] The nature and extent of the qualifications are primarily for the determination of the legislature. The code provisions were enacted because of the importance of the interests committed to the physician's care, requiring knowledge and capacity commensurate therewith, and upon which the community may rely. State *v.* Blair, 112 Iowa, 466. See note 1, p. 260, *supra*.

The statute is uniform in its operation and not unconstitutional on the ground of lack of uniform operation upon all persons in a like situation. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

It grants no privileges and immunities that do not equally belong to all citizens. Iowa Ecl. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

[2] Every citizen has the undoubted right to follow any lawful calling, business, or profession he may select, subject only to such restrictions as the Government may impose for the welfare and safety of society. The unquestioned power of the State to prescribe such restrictions and regulations as in its judgment shall protect the people from the consequences of ignorance or incapacity, as well as of deception and fraud, is especially true with respect to the practice of medicine. State *v.* Blair, 112 Iowa, 466.

[3] No objection can be urged because of the severity of the requirements, if appropriate to the profession and attainable by reasonable study or application. No one is deprived of the right to practise medicine. All that is exacted is that every one who assumes to do so shall be possessed of the requisite knowledge and skill, evidenced by a certificate of the board designated by the State to ascertain his fitness. State *v.* Blair, 112 Iowa, 466.

1899, c. 89, s. 2; Supp. Code 1902, s. 2,582) (see OSTEOPATHY below).[1]

REGISTRATION OF CERTAIN PHYSICIANS OF OTHER STATES. —A certificate of registration, showing that an examination has been made by the proper board of any State, on which an average grade of not less than seventy-five per cent was awarded, the holder having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this State, may be accepted in lieu of an examination as evidence of qualification. But in case the scope of said examination was less than that prescribed by this State, the applicant may be required to submit to a supplemental examination in such subjects as have not been covered (Act 1904, c. 102, s. 1 [*a*], amending s. 2,582, Code Supp. of 1902).

A certificate of registration or license, issued by the proper board of any State, may be accepted as evidence of qualification for registration in this State, provided the holder was at the time of such registration the legal possessor of a diploma issued by a medical college in good standing in this State, and that the date thereof was prior to the legal requirement of the examination test in this State. The fee for such examination is $50 (*ib.*, s. 1, [*b*]).

If by the laws of any State or the rulings or decisions of the appropriate officers or boards thereof any burden, obligation, requirement, disqualification, or disability is put upon physicians registered in this State or holding diplomas from medical colleges in this State, which are in good standing therein, affecting the right of said physicians to be registered or admitted to practise in said State, then the same or like burdens, obligations, requirements, disqualification, or disability shall be put upon the registration in this State of physicians registered in said State, or holding diplomas from medical colleges situated therein (*ib.*, s. 2).

RECORDING.—The certificate must be filed for record in the office of the county recorder in the county wherein the holder resides, before the holder engages in the practice of medicine, and the record is open for public inspection. The same record

[1] The Court has nothing to do with the diversity of opinion as to the necessity for such statutes. Iowa Ec. Med. Coll. Assn. *v.* Schrader, 20 L. R. A., 355; 87 Iowa, 659.

must be made of the certificate in any county to which the holder may remove and in which he proposes to practise (Code 1897, s. 2,577) (see OSTEOPATHY below).

REFUSAL OR REVOCATION OF CERTIFICATE.—The board may refuse a certificate to a person not of good moral character, and for like cause, or for incompetency, or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate has been granted upon false and fraudulent statements as to graduation or length of practice may revoke a certificate by an affirmative vote of at least five members of the board, which shall include one or more members of the different schools of medicine represented in the board;[1] nor shall the standing of a legally chartered medical college from which a diploma may be presented be questioned save by a like vote. After the revocation of a certificate, the holder shall not practise medicine, surgery, or obstetrics in the State (Code 1897, s. 2,578) (see OSTEOPATHY below).

DEFINITION. EXCEPTIONS (see OSTEOPATHY, below).—Any person shall be held as practising medicine, surgery, or obstetrics, or to be a physician, who publicly professes to be a physician, surgeon, or obstetrician, and assumes the duties, or who makes a practice of prescribing, or prescribing and furnishing medicine for the sick, or who publicly professes to cure or heal;[2] but the act does not prohibit students of medicine, surgery, or obstetrics, who have had not less than two courses of lectures in a medical school of good standing, from prescribing under the supervision of preceptors, or gratuitous service in case of emergency; nor does it prevent advertising, selling, or prescribing natural mineral waters flowing from wells or springs; nor does

[1] The statute does not prescribe the practice to be followed on revocation of certificates; a more flexible practice than that followed in courts must of necessity be followed in many cases; the holder should be given a fair opportunity to meet the charges and evidence against him. "Palpable evidence of incompetency" is not easy to define; it must be sufficient to make plain and obvious the incompetency of the accused to practise as a physician and surgeon. In the absence of objection, evidence which tends to prove or disprove the competency of the accused may be considered, though not the best evidence. Consequently a transcript of an affidavit made by a patient, since deceased, and of the minutes of a coroner's inquest, were sufficient evidence on which to revoke a certificate, at a hearing of which the accused had notice and did not attend. Traer *v.* State Board, 106 Iowa, 559.

[2] *Dentist* and *surgeon* are not interchangeable. City of Cherokee *v.* Perkins, 118 Iowa, 405; citing People *v.* De France (Mich.), 62 N. W. R., 709, 28 L. R. A., 139; State *v.* Fisher (Mo.), 24 S. W. R., 167, 22 L. R. A., 799.

it apply to surgeons of the United States army, navy, or marine hospital service, nor to physicians or midwives who have obtained from the board of examiners a certificate permitting them to practise medicine, surgery, or obstetrics without a diploma from a medical school or examination by the board;[1] nor to physicians as defined herein who have been in practice in this State for five consecutive years, three years of which must have been in one locality;[2] nor to registered pharmacists filling prescriptions, nor does it intrefere with the sale of patent or proprietary medicines (Code 1897, s. 2,579). (See Appendix, p. 689.)

ITINERANT PHYSICIAN.[3]—Every physician practising medicine, surgery, or obstetrics, or professing or attempting to treat, cure, or heal diseases, ailments, or injuries by any medicine, appliance, or method, who goes from place to place, or from house to house, or by circulars, letters, or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician,[4] and such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the State board of medical examiners a license as an itinerant, on the payment of a license fee to the treasurer of the State of $250 per annum; on such payment the secretary shall issue to the applicant therefor a license to practise within the State as an itinerant physician for one year from the date thereof. The board may for satisfactory reasons refuse to issue

[1] A person included within the exceptions is still required to procure the proper certificate, and if he fails to procure it, may be guilty of practising in violation of the law. State *v.* Mosher, 78 Iowa, 321 (1889).

[2] Notwithstanding continuous practice in one place, a certificate may be denied, owing to incompetency or immorality. State *v.* Blair, 112 Iowa, 466; citing State *v.* Mosher, 78 Iowa, 321. See note 1, p. 259, *supra*.

When a practitioner, already engaged in practice, applied for a certificate, the board could inquire into his competency, as well as the fact of his practice, and could refuse a certificate for palpable incompetency. State *v.* Mosher, 78 Iowa, 321 (1889).

[3] The distinction in section 2,579 between physicians practising three years in one locality and others practising the same length of time but not in the same locality, is founded in reason, as fixed residence is calculated to develop better experience and higher character, and at the same time to disclose want of capacity or good character. It is therefore not an arbitrary or unlawful distinction. "A rolling stone gathers no moss" is an adage which embodies a principle that may be treated by the legislature as evidence of qualification. State *v.* Blair, 112 Iowa, 466.

[4] The expression "itinerant *doctor*," as likewise "itinerant physician and surgeon," relates to those persons who in some form or in following some school practise either medicine or surgery, or both. City of Cherokee *v.* Perkins, 118 Iowa, 405.

such license or may cancel such license upon satisfactory evidence of incompetency or gross immorality (see OFFENCE, below). Nothing herein shall be construed to prevent any physician otherwise legally qualified from attending patients in any part of the State, to whom he may be called in the regular course of business or in consultation with other physicians (Supp. Code 1902, s. 2,581). Cities and towns are empowered to regulate, license and tax itinerant doctors, itinerant physicians and surgeons[1] (Code 1897, s. 700; Supp. Code 1902, s. 700). *(See Appendix, p. 690.)

OFFENCE.—Presenting a fraudulent or false diploma or the diploma of another to the board of medical examiners for the purpose of procuring a certificate, or filing or attempting to file with the recorder of any county as one's own the certificate of another, or falsely personating one to whom a certificate has been granted by the board, or practising medicine, surgery, or obstetrics without first having obtained and filed for record the certificate required (if not embraced in the exceptions above specified), or continuing to practise medicine, surgery, or obstetrics after the revocation of certificate, is a misdemeanor[2] (Code 1897, s. 2,580).

Filing or attempting to file with the recorder of any county the certificate of another with the name of the party to whom it was granted or issued erased and the claimant's name inserted, or filing or attempting to file with the board of medical examiners any false or forged affidavit of identification, is forgery (*ib.*).

Practising medicine as an itinerant physician as herein defined without having procured such license is a misdemeanor (Supp. Code 1902, s. 2,581) (see OSTEOPATHY, below).

PENALTY.—On conviction of misdemeanor as above, fine $300 to $500 and costs, and commitment to county jail till paid (*ib.*).

For forgery, imprisonment in penitentiary not more than ten years (Code 1897, s. 4,853) (see OSTEOPATHY, below).

FEES.—To county recorder for recording certificate, 50 cents (*ib.*, s. 2,577).

To secretary of the board in advance of examination, from

[1] Where a city ordinance prescribed a local license for itinerant doctors, itinerant physicians, and surgeons, this was held not to include an itinerant dentist. City of Cherokee *v.* Perkins, 118 Iowa, 405.

[2] See State *v.* Mosher, note 1, p. 259.

each applicant, $10 (Code 1897, s. 2,576, as amended 1900, c. 89, s. 1).

To treasurer of State, for license as itinerant, $250 per annum (Code 1897, s. 2,581).

For examination under [*b*] of s. 1, c. 102, Act 1904, $50 (Act 1904, c. 102, s. 1 [*b*]).

OSTEOPATHY.—Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa Osteopathic Association, and wherein the course of study comprises a term of at least twenty months or four terms of five months each in actual attendance at such school, and shall include instruction in anatomy, including dissection of a full lateral half of the cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics, and theory of osteopathy, and two full terms of practice of osteopathy, shall, upon the presentation of such diploma to the State board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by the board an examination on the branches herein named (except the theory and practice of osteopathy, until there may be appointed an osteopathic physician on the state board of health and medical examiners).

The fee for such examination, which shall accompany the application, is $10. The examination shall be conducted in the same manner and at the same date and place that physicians are examined under section 2,576 Code. The same general average shall be required as in cases of physicians;[1] provided that osteopaths who are graduates of legally incorporated schools of osteopathy as above recognized, and who are at the time of the passage of this act (April 8th, 1902, Act 1902, c. 158; 29 G. A., 158) engaged in the practice of osteopathy, shall be entitled to receive a certificate upon the payment of the prescribed fee without such examination. Upon passing a satisfactory examination as above prescribed the board shall issue a certificate to the applicant permitting such person to practise osteopathy, which certificate shall be registered with the recorder of the county in which the holder resides (Supp. Code 1902, s. 2,583 a). The holder shall not be subject to Code s. 2,580 (*ib.*).

The certificate shall not authorize the holder to prescribe or

[1] See note 1, p. 261.

use drugs in his practice nor to perform major or operative surgery (*ib.*, s. 2,583, *b*).

OSTEOPATHY—REFUSAL, REVOCATION OF CERTIFICATE.—The board may refuse a certificate to a person otherwise qualified, not of good moral character. For like cause, or incompetency, or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate had been granted upon false and fraudulent statements as to graduation or length of practice, the board may revoke a certificate by an affirmative vote of at least five members of the board, including one or more members of the different schools of medicine represented in the board. After the revocation of a certificate the holder shall not practise osteopathy, surgery, or obstetrics in the State (Supp. Code 1902, s. 2,583, *c*).

OSTEOPATHY—OFFENCES.—A person presenting to the board a fraudulent or false diploma, or one of which he is not the rightful owner, for the purpose of procuring a certificate as herein provided, or filing or attempting to file with the recorder of any county the certificate of another as his own, or falsely personating any one to whom a certificate has been granted by the board, or practising osteopathy, surgery, or obstetrics without first obtaining and filing for record the certificate required, and not embraced within any of the exceptions in this chapter (Ch. 17 A., Supp. Code 1902), or continuing to practise osteopathy, surgery, or obstetrics after the revocation of his certificate, is guilty of a misdemeanor. Penalty, fine $300 to $500 and costs of prosecution, and commitment to county jail till fine is paid.

Filing or attempting to file with any county recorder the certificate of another, with the name of the *party* to whom it was granted or issued erased and the claimant's name inserted, or filing or attempting to file with the board any false or forged affidavit of identification, is forgery (Supp. Code 1902, s. 2,583, *d*).

ITINERANT OSTEOPATH.—Every person practising osteopathy or obstetrics, or professing to treat, cure, or heal diseases, ailments, or injury by any osteopathic application or method, who goes from place to place, or from house to house, or by circulars, letters, or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, is an itinerant osteopath; in addition to the cer-

tificate elsewhere in this chapter required, he must procure from the State board a license as an itinerant, and pay to the State treasurer $250 per annum. On payment of this sum the secretary shall issue to the applicant a license to practise within the State as an itinerant osteopath for one year from the date thereof. The board may for satisfactory reasons refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality (Supp. Code 1902, s. 2,583, *e*).

Osteopathy—Fees.—Upon examination under Supp. Code 1902, s. 2,583, *a*, to accompany application, $10 (Supp. Code 1902, s. 2,583, *a*).

By graduates entitled to certificate without examination under Supp. Code 1902, s. 2,583, *a*, $10 (*ib.*).

To county recorder for registration of certificate, 50 cents (*ib.*).

License fee of itinerant osteopath, to State treasurer, $250 per annum (Supp. Code 1902, s. 2,583, *e*).

Kansas.[1]

Board of Medical Registration and Examination.[2]—The board consists of seven members, physicians in good standing in their profession, who have received the degree of doctor of medicine from some reputable medical college or university,[3] not less than six years prior to their appointment; representation to be given to the different schools of practice as nearly as possible in proportion to their numerical strength in the State, no school to have the majority of the whole board.[4] The president and secretary have power to administer oaths pertaining to all matters related to the business of the board. The board holds regu-

[1] Statutes regulating the practice of medicine and surgery were enacted as early as 1760, and they have been uniformly upheld when their validity was assailed in the courts. State *v.* Wilcox, 64 Kan., 789.

[2] The board is not a judicial tribunal; it acts *quasi*-judicially, but is only a ministerial board and performs no judicial functions. Meffert *v.* Medical Board, 66 Kan., 710. *See Appendix, p. 691.

[3] In the absence of some evidence raising a question, the presumption is that a college is respectable; but where a paper, purporting to be issued by a medical college as a diploma, neither proves nor tends to prove that the holder has attended any course of instruction or has graduated at such institution, the paper should be excluded from the consideration of the jury. State *v.* Wilson, 62 Kan., 621.

[4] See for the discussion of the effect upon practitioners of different schools of practice, of this constitution of the board, holding that it was not prejudicial to the applicant and was not a practical question in the case before it, State *v.* Wilcox, 64 Kan., 789.

lar meetings on the second Tuesday in February, June, and October, and one other meeting at such time and place as the board may designate, in such of the chief cities of the State as the board may designate. No license to practise medicine[1] and surgery shall be issued by the board on less than five affirmative votes when the full board is present, or upon less than a majority affirmative vote when less than a full board is present[2] (Act 1901, c. 254, s. 1;[3] Dassler's Gen. Stats. 1901, s. 6,669).

Record and Register of Board.—The board is required to keep a record of its proceedings, and also a register of all applicants for license to practise medicine in all of its branches, with a record showing the age of the applicant, time spent in the study of medicine, and the name and location of the institution or institutions from which the applicant may have received degrees or certificates of medical instruction; also whether the candidate was licensed or rejected. Said books and register are *prima facie* evidence of all matters recorded therein (*ib.*).

[1] The practice of medicine consists: (1) in judging the nature, character, and symptoms of the disease; (2) in determining the proper remedy for the disease; (3) in giving or prescribing the application of the remedy to the disease. Underwood *v.* Scott, 43 Kan., 714 (1890).

If the person who makes a diagnosis also gives the medicine to the patient, he is practising medicine within the statute (so held of Act 1870, c. 68, now repealed, which did not define *practising medicine*). Underwood *v.* Scott, 43 Kan., 714 (1890).

If a person is unauthorized to practise or is acting in violation of the provisions of the statute, he is not entitled to compensation for the medicine which he furnishes at the time as a physician; it was error to instruct that a physician could recover for the medicine furnished, though he might not have been entitled to practise medicine. Underwood *v.* Scott, 43 Kan., 714 (1890).

[2] The courts will not presume that the board will act arbitrarily and unjustly, but rather that it will deal justly with all applicants for license; the discretion vested in it is not arbitrary, capricious, nor unrestrained; the law requires that the board shall exercise an honest and impartial judgment and discretion, in accordance with just rules; if it should depart from this course and act arbitrarily and unjustly, the courts are open to applicants and will award them relief and protection. State *v.* Wilcox, 64 Kan., 789.

[3] The Act of 1901, c. 254, is constitutional; its title sufficiently embraces its subject; its provisions are not prohibitive, because the profession and practice are still open to every citizen of the United States who is qualified and who can produce evidence of the same; the police power may so regulate the practice of medicine as to protect the people from ignorance and incapacity as well as from deception and fraud; it is not an arbitrary discrimination nor an invalid deprivation of right to provide that only those possessing a knowledge of the human system, of its ailments and diseases, and who possess the skill to apply remedies and practise the art of healing, shall be allowed to practise. State *v.* Wilcox, 64 Kan., 789; citing also State *v.* Creditor, 44 Kan., 565.

FORMER PRACTITIONERS.[1]—The law required all persons engaged in the practice of medicine,[2] on the date of its passage[3] (March 22d, 1901), to apply to the board within four months thereafter for a license to practise. It provided for the issue of a license to those presenting a diploma,[4] upon complying with certain conditions, and the certificate of the board, left for record with the county clerk in which the applicant practises, is conclusive evidence that its owner is entitled to practise medicine and surgery in the State.[5] It also provided for the issue of a certificate by the board to residents engaged continuously in the State for seven years prior to the act,[6] with like effect when so left for record. It also provided for the issue of a certificate, with like effect when so left for record, after examination, to practitioners not such graduates and not of seven years' practice (Act 1901, c. 254, s. 2; Dassler's Gen. Stat. 1901, s. 6,670).

[1] Prior to the Act of 1870, c. 68, no test of qualification was made nor any statutory restrictions imposed upon the profession. State *v.* Wilson, 61 Kan., 791.

One who practised medicine before the passage of the Act of 1870 was exercising a legal right, while one who practised thereafter, not having complied with its provisions, was engaged in the commission of a crime. State *v.* Wilson, 61 Kan., 791; criticising Wert *v.* Clutter, 37 Ohio St., 347.

There are no provisions of the law which are arbitrary or unequal in their application. State *v.* Wilcox, 64 Kan., 789.

[2] In the absence of proof to the contrary, it will be presumed that the laws of Nebraska are the same as those of Kansas (so held, apparently, with respect to the presumption that there is a similar *statute* in Nebraska). State *v.* Wilson, 62 Kan., 621 (1901, under Act 1870, c. 68, now repealed). See note 1, p. 269.

[3] It could not have been the intent of the legislature under the Act of 1870, c. 68 (which provided that a person engaged continuously in practice for ten years should be considered to have complied with the act), to permit ten years' persistent violation of the prohibitions of the act to qualify the violator to practise medicine under the act; therefore the period of ten years mentioned in the act must have been a period of ten years before its passage. The authority or right to practise medicine cannot be builded on wrong or crime. State *v.* Wilson, 61 Kan., 791.

[4] See p. 268, n. 3.

[5] The statute (so held of the prior Act of 1870, c. 68) should not be so construed as to give a person the privilege of exercising a right which is in violation of any of its provisions; to hold that a person who furnished medicine as a physician could recover compensation for the medicine so furnished or prescribed would render the statute nugatory. Underwood *v.* Scott, 43 Kan., 714 (1890).

[6] Where the act (1870, c. 68, now repealed) contained a provision excepting from its prohibitive operation persons engaged in practice continuously for ten years or more before it took effect, evidence that the accused had practised in Nebraska for ten years, after the law in Kansas took effect, was held to be wholly inadmissible to excuse the accused. State *v.* Wilson, 62 Kan., 621. See note 3, *supra*.

REFUSAL—REVOCATION.—The board may refuse to grant a certificate to any person guilty of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery, and may, after notice and hearing, revoke the certificate for like cause (*ib.*).[1]

QUALIFICATION[2]—MEDICINE, SURGERY — OSTEOPATHY.—All persons intending to practise medicine, surgery, or osteopathy after the passage of the act (March 22d, 1901), and all persons who have not complied with section 2 (see FORMER PRACTITIONERS, *supra*), shall apply to the board[3] at

[1] Where charges formulated by citizens and presented to the board were not as formal or specific as would be required in an information or indictment, but were ample to challenge the attention of the board and to notify the accused of the nature of the accusations, they were adequate to empower the board to proceed, and, after hearing, at which the accused was present in person and by counsel, to authorize the revocation of his license. Meffert *v.* Medical Board, 66 Kan., 710. *See Appendix, p. 691.

The provisions of the act indicate that the investigation was not intended to be carried on in observance of the technical rules adopted by courts of law; the members are not learned in the science of the law; to require that they proceed in conformity to the technical rules of a common-law court would at once disqualify it from making any investigation. A summary proceeding of this kind is not like a common-law trial, nor are the same precision and accuracy required as in a trial before a court; the duty of determining the sufficiency of the evidence belongs to the board and not to the Court; the findings of the board are conclusive on the Court (even where, as in this case, evidence of rumor, hearsay, and gossip had been admitted). Meffert *v.* Medical Board, 66 Kan., 710.

The immoral conduct which entitles the board to revoke or refuse a certificate need not be in the line of professional conduct; the felony need not have been committed on a patient or his property, nor while attending a patient. Meffert *v.* Medical Board, 66 Kan., 710.

It is within the police power of a State to prescribe the qualifications of one desiring to practise, and also to provide for the creation of a board to make the examination and determine whether the applicant is qualified, and to issue a license, and also to revoke a license if it appears that it should not have been issued, or the holder, since its issue, has become disqualified. To revoke a license to practise medicine otherwise than by a judgment of forfeiture by a judicial tribunal is not a deprivation of property without due process of law, and does not violate the fourteenth amendment of the United States Constitution. Meffert *v.* Medical Board, 66 Kan., 710. *See Appendix, p. 691.

The revocation of such a license is not the exercise of judicial power, but of the police power; the body vested with the power to grant may be vested with the power to revoke. Meffert *v.* Medical Board, 66 Kan., 710. *See Appendix, p. 691.

The power to revoke a license for offences committed before the passage of the act is not an *ex post facto* law, because it is not a punishment, but a protection to citizens; if the qualification is reasonable, no one is entitled to complain; the purpose of the law is a standard of qualification, not a punishment. Meffert *v.* Medical Board, 66 Kan., 710 (contrasting it with disbarment of an attorney, which is a punishment).

[2] See p. 269, n. 3; State *v.* Wilcox, p. 270, n. 1; Meffert *v.* Medical Board, *supra*, n. 1.

[3] The power of the State to determine the qualification for office and the conditions upon which citizens

any regular meeting, or at any other time or place as may be designated by the board, for a license.[1] Application must be in writing, accompanied by the fee (see FEES, *infra*), with the age of the applicant, proof that he or she is of good moral character, and satisfactory evidence that he or she has devoted not less than three periods of six months each, no two within the same twelve months, or, if after April 1st, 1902, four periods of not less than six months each, no two in the same twelve months, to the study of medicine and surgery. All such candidates, except as hereinafter provided, shall submit to examination, of a character to test their qualifications as practitioners of medicine and surgery, which shall embrace all those topics and subjects, a knowledge of which is generally required by reputable medical colleges of the United States for the degree of doctor of medicine; provided that the examination in materia medica and therapeutics and the theory and practice of medicine shall be conducted by those members only of the board who are of the same school of practice as the applicant claims to follow. Graduates of legally chartered medical institutions of the United States or foreign countries in good standing, as determined by the board, may be, at the discretion of the board, granted a license without examination. Any graduate of a legally chartered school of *osteopathy*, wherein the requirements for the giving of a diploma include a course of instruction of not less than four terms of five months each, in two or more separate years, shall be given a certificate of license to practise osteopathy upon the presentation of such diploma. The board may in its discretion accept, in lieu of examination or diploma, the certificate of the board of registration and examination of any other State or Territory of the United States or any foreign country whose standards of qualification for practice are equivalent to those of Kansas.[2] A temporary certificate may be issued to any student of medicine or practitioner of medicine, not qualified under the law, upon the written request of a majority of the practitioners of medicine under this act in the county in which he or

may exercise the various callings and pursuits within its limits was recognized in England more than three hundred years ago (citing Dr. Bonham's case, 4 Coke, 367). Meffert *v.* Medical Board, 66 Kan., 710.

[1] A practitioner and the people of the community are bound to know that the State laws prescribe conditions for practice. State *v.* Wilson, 62 Kan., 621.

[2] See p. 270, n. 2.

she desires to practise, or, if there be no practitioners registered under this act in any county in the State, the board shall issue a temporary permit to persons as above described upon the application of the board of county commissioners of said county (Act 1901, c. 254, s. 3; Dassler's Gen. Stats. 1901, s. 6,671).

Temporary Permit.—The secretary of the board may in his discretion issue a temporary permit to practise medicine, surgery, or osteopathy to any person who shall have made application in writing to said board for license to practise, accompanied by the prescribed fee, and proof as required by s. 3, c. 254, laws 1901 (*supra*), and who shall be a graduate of any legally chartered medical institution of the United States or any foreign country, or any legally chartered school of osteopathy; or such permit may be so issued to any such applicant for license, complying with said conditions, who is shown to have been licensed by the board of registration and examination in any other State or Territory of the United States or any foreign country whose standards of qualification for practice are equivalent to those of Kansas. Any such temporary permit shall, when recorded in the office of the county clerk of the county in which he resides, authorize the person receiving it to practise medicine, surgery, or osteopathy in the same manner as a permanent license, up to the commencement of the next regular meeting of the board. Neither the board nor its secretary has power to issue more than one temporary permit to any one person, nor to extend any such permit beyond the time herein limited (Act 1903, c. 358, s. 1).

Certificate.—On the completion of the examination or acceptance of the diploma or certificate as above (in Act 1901, c. 254) provided, the board, if it finds the applicant qualified, shall grant and issue a certificate to the applicant to practise medicine [1] and surgery or osteopathy within the State; within thirty days of the date of the certificate, the owner must have it recorded in the office of the clerk of the county in which he resides, or, if a non-resident of the State, then of the county in which he has an office or intends to practise, and the date of recording shall be indorsed on it. Until the certificate or license [2] is recorded he shall not exercise any of the rights or privileges

[1] See p. 269, n. 1.

[2] A municipal license tax on itinerant physicians, surgeons, or oculists, or magnetic, psychic, or other healers was upheld in Steiner *v.* Liggett, 67 Kan., 822; cf. Mayor, etc., of Savannah *v.* Charlton, 36 Ga., 460, *supra*, p. 224, n. 1.

therein conferred. The county clerk must keep in a book a complete list of the certificates recorded by him, which shall be open to public inspection during business hours (Act 1901, c. 254, s. 4; Dassler's Gen. Stats. 1901, s. 6,672).

DEFINITION.—Any person is regarded as practising medicine [1] who prescribes or recommends for a fee, for like use, any drug or medicine, or performs any surgical operation of whatever nature for the cure or relief of any wounds, fracture, or bodily injury, infirmity, or disease of another person, or who uses the words or letters "Dr.," "Doctor," "M.D.," or any other title in connection with his name which in any way represents him as engaged in the practice of medicine and surgery (Act 1901, c. 254, s. 6; Dassler's Gen. Stats. 1901, s. 6,674).

RELIGIOUS BELIEFS.[2]—Nothing in the act is to be construed as interfering with any religious beliefs in the treatment of disease, provided that quarantine regulations relating to contagious diseases are not infringed upon (*ib.*).

OSTEOPATHS.—All persons practising osteopathy must be registered and licensed as doctors of osteopathy, but they shall not administer drugs or medicines of any kind nor perform operations in surgery (*ib.*).

EXCEPTIONS [3] — OPTICIAN — DOCTOR OF OPTICS. — The act does not apply to any commissioned medical officer of the United States army, navy, or marine hospital service, in the discharge of his official duties; nor to any legally qualified dentist when engaged in the legitimate practice of his profession; nor to any physician or surgeon called from another State or Territory in consultation with a licensed physician of this State, or to treat a particular case in conjunction with a licensed practitioner of the State, and who does not otherwise practise in the State. Nothing in the act applies to the administration of domestic medicines nor prohibits gratuitous services;[4] provided any person holding a diploma issued by an optical college, and who has studied the

[1] See p. 269, n. 1.

[2] The act is not invalid because of the provision that it shall not be construed as interfering with religious beliefs; the Constitution guarantees religious freedom, and this would have been implied without mention in the statute; there is nothing in this provision which makes an illegal discrimination against or in favor of any class of physicians. State *v.* Wilcox, 64 Kan., 789.

[3] See p. 270, n. 1, State *v.* Wilcox.

[4] It is the practice of medicine and surgery for compensation that is sought to be regulated and controlled; not the use of home remedies nor the neighborly offices which one may kindly and gratuitously perform for another; and the exception of these

anatomy of the eye and contiguous parts, human physiology, and natural philosophy for at least six months under a competent teacher, and who shall pass examination satisfactory to the State board of medical registration and examination, shall be eligible to register as an optician or doctor of optics, and shall be otherwise governed by this act so far as applicable (*ib.*).

OFFENCE—PENALTY.—Practising medicine and surgery or osteopathy in the State, without having received and had recorded a certificate under this act, or violating any of its provisions, is a misdemeanor,[1] punishable with a fine of from $50 to $200; and in no case wherein the act is violated shall the violator receive compensation for services rendered[2] (Act 1901, c. 254; *ib.*, s. 7; Dassler's Gen. Stats. 1901, s. 6,675).

ENFORCEMENT.—It is the duty of the secretary of the board to see that the act is enforced (*ib.*).

PERJURY.—To swear falsely in any affidavit or oral testimony made or given by virtue of the provisions of the act or the regulations of the board is perjury (Act 1901, c. 254, s. 8; Dassler's Gen. Stats. 1901, s. 6,676).

FEES.—To the county clerk, for recording and reporting certificates, not more than $1 (Act 1901, c. 254, s. 4; Dassler's Gen. Stats. 1901, s. 6,672).

does not invalidate the act. State *v.* Wilcox, 64 Kan., 789.

[1] Where the evidence of qualification to practise is not a matter of public record, and is therefore peculiarly within the knowledge of one accused of practising without being qualified, the burden is on the accused to prove his qualification; but where the evidence is matter of public record, if it exists, the burden of proving that it does not exist is on the prosecution. State *v.* Wilson, 62 Kan., 621. See p. 272, n. 1.

[2] Where a pleading, in an action for professional services and expenses incurred as a practising physician and surgeon, alleged that "plaintiff *is* a physician and duly entitled to practise medicine under the laws of Kansas," and was subsequently amended to allege that "the plaintiff is a physician and surgeon duly entitled to practise medicine and surgery under the laws of Kansas," it was held that the pleading did not permit evidence of qualification nor uphold a judgment for recovery for medical and surgical services performed months prior to the filing of the pleading. It was essential to recovery that at the time of performing the services plaintiff possessed the requisite qualifications. Westbrook *v.* Nelson, 64 Kan., 436.

If the pleading had alleged the proper qualification and authority to engage in the practice of medicine and surgery at the time of the performance of the services, and no issue had been joined thereon by proper denial, the allegation of authority would have required no evidence in its support. Westbrook *v.* Nelson, 64 Kan., 436.

On liberality of construction of pleadings to recover in justice's courts for professional services, and method of proving qualification thereunder, see Sailor *v.* Caldwell, 65 Kan., 86.

For issuance of certificate without examination under section 2, $2 (Act 1901, c. 254, s. 5; Dassler's Gen. Stats. 1901, s. 6,673).

For examination, to be fixed by the board, not to exceed $15 (*ib.*).

For examination of diploma or certificate from examining board of another State, to be fixed by the board, not to exceed $10 (*ib.*).

KENTUCKY.[1*]

*(See Appendix, p. 691.)

MEDICAL REGISTER.—The county clerk of each county is required to keep a medical register for the registration of physicians, and when any physician shall die or remove from the county he shall make a note of the same at the bottom of the page; on January 1st annually he is required to transmit to the office of the State board of health a duly certified list of the physicians of his county registered under this law (Carroll's Ky. Stats. [1903], s. 2,611; Act April 10th, 1893, c. 179, s. 1).

QUALIFICATION.[2]—It is unlawful[3] for any person to prac-

[1] There is no constitutional objection to any provision of the act (so held of Act 1874, February 23d, and its amendments). Driscoll *v.* Commonwealth, 93 Ky., 393 (1892).

The authority to practise under former laws is considered in Hargan *v.* Purdy, 93 Ky., 424.

The purpose of the Kentucky statute was to protect the people from empiricism. Nelson *v.* State Board of Health, 108 Ky., 769.

Empiricism is a practice of medicine founded on mere experience without the aid of science or the knowledge of principles. Nelson *v.* State Board of Health, 108 Ky., 769.

[2] One who sues for slander and for libel, alleging that the slander and libel consisted in calling him *no doctor, nothing but a travelling quack*, and in asserting that *he knows nothing about medicine*, and who shows in his petition how and by what authority he was entitled to practise as a physician, and who thereby fails to show that he was duly and legally authorized to practise, could not in law have been injured or sustained damage; for, if practising in violation of statute, he could not in law have been injured or have sustained damage from being characterized by the language complained of, or could not be heard in a court of justice to complain. Hargan *v.* Purdy, 93 Ky., 424.

A physician, not legally authorized to practise in the State, when alleged slanderous and libellous words were published of him respecting his profession, as a legal sequence has no cause of action therefor. Hargan *v.* Purdy, 93 Ky., 424.

If the statute (in 1900) applies to osteopaths, it also applies to trained nurses and all others of that class who for compensation administer to the wants of the sick. If it were so construed, every one would be compelled, willing or unwilling, to employ a registered physician when sick, or to trust himself to gratuitous services. Such a law would be of doubtful constitutionality, as restricting the free choice of the citizen; but the statute was designed to do no more than regulate the practice of medicine by physicians and surgeons, and the penalties are similarly limited. Nelson *v.* State Board of Health, 108 Ky., 769.

[3] The legislature may say you shall

tise medicine[1] in any of its branches who has not exhibited and registered in the county clerk's office, of the county in which he resides, his authority to practise,[2] with his age, address, place of birth, and the school or system of medicine to which he professes to belong.[3] The person registering must subscribe and verify by oath before such clerk an affidavit containing such facts, which, if wilfully false, subjects the affiant to punishment for perjury (Act 1893, April 10th, c. 179, s. 2; Carroll's Ky. Stats. 1903, s. 2,612).

The authority to practise medicine shall be a certificate from the State board of health to be issued upon application to any reputable physician who is practising or who desires to begin to practise medicine, who possesses a diploma from a reputable medical college[4] legally chartered under the laws of this State, or

not practise medicine unless you have the indorsement of a board skilled in the profession, and it may prescribe the mode of determining the qualification. Driscoll *v.* Commonwealth, 93 Ky., 393.

[1] Osteopathy is a new method of treating diseases, said to have originated with Dr. A. T. Still, of Kirksville, Mo., about 1871. The history of the School of Osteopathy at Kirksville, Mo., and of other schools of osteopathy considered: Nelson *v.* State Board of Health, 108 Ky., 769.

An osteopath is in no proper sense a physician or surgeon; he does not practise medicine or surgery; he is rather on the plane of a trained nurse; he may be paid for his labor; his services are no more the practice of medicine than is bathing a patient, and he violates no law in so practising osteopathy (1900). Nelson *v.* State Board of Health, 108 Ky., 769.

[2] Authority to practise medicine under the statute can only be conferred by a certificate from the State board of health. Nelson *v.* State Board of Health, 108 Ky., 769.

[3] The legislature (by Act April 25th, 1888) did not intend the mere fact of a person being registered by a county clerk in the Medical Register to be conclusive evidence of authority to practise by reason of a diploma or compliance with section 2, Act 1874; the authenticity and validity of a pretended diploma and the verity and sufficiency of facts stated in the physician's affidavit as to the length of time he has practised medicine may be called in question. Hargan *v.* Purdy, 93 Ky., 424.

[4] A diploma from a reputable college in which there may be taught a new system of practice, or in which there may be a departure from the old system, affords no reason for withholding an indorsement by the board of health. Driscoll *v.* Commonwealth, 93 Ky., 393.

The fact that a school is a reputable school of osteopathy does not necessarily constitute it a reputable school of medicine within the meaning of the law. Nelson *v.* State Board of Health, 108 Ky., 769.

If the board discriminates against a school on account of its system of medicine, it exceeds its power; but a school of osteopathy is not a reputable medical college within the meaning of the act; the terms *physician*, *practice*, *medicine*, and *medical college* were used in their well-defined popular sense; *physician* refers to those exercising the calling of treating the sick by medical agencies, as commonly practised when the act was passed; *medical college*, to those schools teaching medicine in its different branches at which physicians at that time were educated, or schools of that character organized since. An essential part of such instruction was teaching the nature of medicines,

a diploma from a reputable[1] and legally chartered medical college of some other State or country, indorsed as such by said board,[2] or satisfactory evidence from the applicant that he was reputably and honorably engaged in the practice of medicine in the State prior to February 23d, 1864,[3] or satisfactory evidence from any person who was reputably and honorably engaged in the practice of medicine in Kentucky prior to February 23d, 1884,[3, 4] who has passed a satisfactory practical examination before said board. Applicants may present their credentials by mail or proxy, and the board shall issue its certificate to such applicants as are entitled as though the applicant was present (Act 1894, c. 51; Carroll's Ky. Stats. 1903, s. 2,613).[5]

ITINERANT PHYSICIAN.—Nothing in the law authorizes any itinerant doctor to register or practise medicine (Act 1893, April 10th, c. 179, s. 4; Carroll's Ky. Stats. 1903, s. 2,614).

REFUSAL, REVOCATION OF CERTIFICATE.—The board may refuse a certificate to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, and may, after due notice and hearing, revoke such cer-

how to compound and administer them, and for what maladies to be used; and surgery is an essential part of the instruction. Nelson *v.* State Board of Health, 108 Ky., 769.

Osteopathy teaches neither therapeutics, materia medica, nor surgery, and ignores bacteriology; it administers no drugs; it uses no knife. [For what it does profess, see this case.] A school which does none of these things cannot be regarded as a medical college in the popular sense. Nelson *v.* State Board of Health, 108 Ky., 769.

[1] See p. 277, n. 4.

[2] The amendment of 1890, dispensing with the indorsement of a medical school or medical society where the diploma was obtained out of the State, and requiring the indorsement by the State board of health, did not apply where physicians prior thereto, by complying with the previous enactments, entered upon the practice of their profession; it affects only those who failed to comply with the former statute or who, since the passage of the Act of 1890, commenced to practise without complying with its provisions; the right of a physician who practised before 1890, and who complied with the law then in existence, could not be questioned under the Act of 1890. Driscoll *v.* Commonwealth, 93 Ky., 393.

[3] It is an unreasonable construction that one may become qualified by practice in violation of the statute. Commonwealth *v.* Rice, 93 Ky., 393.

[4] There is (1900) no authority to examine any one not engaged in practice prior to February 23d, 1884, or to issue a certificate to such person, unless he is a reputable physician having a diploma from a reputable college; without such a certificate it is unlawful to practise medicine in any of its branches within the State. Nelson *v.* State Board of Health, 108 Ky., 769.

[5] The law is valid so far as it authorizes the board to pass upon the qualifications of persons and to license them. If the board should exercise that power arbitrarily or capriciously, the injured party may obtain relief in the courts. Matthews *v.* Murphy, 23 Ky. Law R., 750.

tificates for like cause. In cases of refusal or revocation the applicant may appeal to the governor, whose decision affirming or overruling the decision of the board shall be final (Act 1893, April 10th, c. 179, s. 5; Carroll's Ky. Stats. 1903, s. 2,615).[1]

Systems, Exceptions.—The law does not discriminate against any peculiar school or system of medicine,[2] nor prohibit women from practising midwifery, nor prohibit gratuitous services in case of emergency, nor apply to commissioned surgeons of the United States army, navy, or marine hospital service, nor to legally qualified physicians of another State called to see a particular case or family, but who do not open an office or appoint a place in the State where he or she may meet patients or receive calls (Act 1893, April 10th, c. 179, s. 6; Carroll's Ky. Stats. 1903, s. 2,616).

Prosecution.[3]—It shall be the duty of the State and local boards of health to bring to the attention of the courts any violations of the provisions of this law within their respective jurisdictions (Act 1893, April 10th, c. 179, s. 7; Carroll's Ky. Stats. 1903, s. 2,617).

Penalty.—Any person living in this State or coming into

[1] A physician was charged with advertising that he could cure cancer, tapeworm, and piles without the use of a knife; with reflecting upon the medical profession by advertising; with practising osteopathy; with guaranteeing a cure or no pay; and, by reason of the foregoing acts, with *unprofessional conduct* of a character likely to deceive or defraud the public. *Held*, that the license which he received under section 2,615 was a right or estate; that the purpose of the statute requiring certain qualifications was to prevent entry into the profession without fitness; it was not intended that the power should be arbitrarily or capriciously exercised. The State board of health has not the right to charge one licensed to practise medicine with unprofessional conduct likely to deceive or defraud the public, erect a standard by which that conduct is to be measured, and, if in its judgment he does not meet its requirements, summarily deprive him of a right or estate or both. As the statute does not advise him what is unprofessional conduct, he could not knowingly or intentionally be guilty of it. If the legislature desires to declare for what acts or conduct a physician's license shall be revoked, it may do so and vest in some tribunal the right to investigate the charges. But the present statute prescribes no rule to govern the conduct of the profession nor the board in adjudging its effect. The act is unconstitutional so far as it authorizes revocation for unprofessional conduct. Matthews *v.* Murphy, 23 Ky. Law R., 750; 63 S. W. R., 785; 54 L. R. A., 415; citing *Ex parte* Jackson, 45 Ark., 164; *Ex parte* McNulty, 77 Cal., 164. See *infra*, p. 694.]

[2] It is immaterial that it does not appear from a diploma, or otherwise, what system of medicine was taught in a medical school. Driscoll *v.* Commonwealth, 93 Ky., 393. See note 4, p. 277.

[3] The same technical rule should not be applied on demurrer to an information as to an indictment. Commonwealth *v.* Rice, 93 Ky., 393.

this State who shall practise medicine or attempt to practise medicine in any of its branches, or who shall treat or attempt to treat any sick or afflicted person by any system or method whatsoever, for reward or compensation, without first complying with the provisions of this law, shall be punished with a fine of $50, and on each subsequent conviction by a fine of $100 and imprisonment for thirty days, or either, or both, in the discretion of the court or jury; and in no case where any provision of this law has been violated shall the violator be entitled to receive compensation for services rendered.[1]

DEFINITION.—To open an office for such purpose or to announce to the public in any way a readiness to treat the sick or afflicted shall be deemed to engage in the practice of medicine (Act 1898, c. 47; Carroll's Ky. Stats. 1903, s. 2,618).[2]

FEES.—To the county clerk, from each physician registered, for all services required, 50 cents (*ib.*, s. 2,611).

The State board of health shall not charge more than $2 for any certificate (Act 1894, c. 51; Carroll's Ky. Stats. 1903, s. 2,613).

LOUISIANA.

CONSTITUTIONAL PROVISION.—The general assembly must provide for the interest of State medicine in all its departments, and for the protection of the people from unqualified practitioners of medicine (Const. 1898, Art. 297).

MEDICAL EXAMINERS[3] shall consist of two boards,[4] appointed by the governor—one, of the physicians and surgeons recommended by the Louisiana State Medical Society, and one, of physicians and surgeons recommended by the Hahneman State Medical Society. There shall be five members of each board, any three of whom shall constitute a quorum for the purpose of holding an examination and granting a certificate. All the members of both boards shall be graduated physicians and practitioners.

[1] Under the pharmacy law, while a regular physician may sell drugs to his own patients, he cannot lawfully, if not a registered pharmacist, fill prescriptions sent to him by others. Commonwealth *v.* Hovions, 112 Ky., 491.

[2] See, however, notes, p. 276, n. 3; p. 277, notes 1, 4.

[3] History of the passage of this law through the legislature (as bearing on its constitutionality), see Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

[4] Courts cannot control the selection of agencies through which the legislature acts in determining qualifications. It has the right to provide for a board of this constitution. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

The board composed of members recommended by the Louisiana State Medical Society shall examine all applicants who propose to practise any other than the homœopathic system of medicine,[1] and the board composed of members recommended by the said Hahneman Society shall examine all applicants who propose to practise the homœopathic system of medicine (Act 49 of 1894, s. 3).

All examinations and answers shall be in writing, and filed and kept as records (*ib.*).

The president and secretary of their respective boards are empowered to administer oaths in taking testimony on matters pertaining to the duties of the board (*ib.*, s. 6).

The board of examiners shall hold two meetings each year, one in the city of New Orleans and one in the city of Monroe, but the president may call meetings elsewhere whenever the board may deem it necessary or expedient (*ib.*, s. 7, as amended by Act 81, 1896).

The boards shall report to the prosecuting officer of the State of Louisiana all persons violating the provisions of the act (*ib.*, s. 18).

Qualification.[2]—After the promulgation of this act (1894) no person, except those already engaged under existing laws in the practice of medicine, surgery, midwifery, and dentists, shall practise medicine in any of its departments,[3] unless such person shall possess all the qualifications required by this act (Act 49 of 1894, s. 1; Wolff's Laws of La. 1904, p. 1,235).[4]

After the promulgation of this act (1894), any person before

[1] There is no constitutional right for those entertaining peculiar theories to be recognized and dealt with as a particular school of medicine. *Ib.*

There is no authority to prevent an applicant from going before the board, by a prejudgment that his diploma is not from a medical college in good standing; it is the duty of the board to receive and pass on all applications, on evidence submitted to them in each case. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

[2] This act was passed in conformity with Art. 37 of the Constitution; it embraces but one subject, and that expressed in its title, in accordance with Art. 29 of the Constitution; it is not a special law, and therefore does not violate Art. 46 of the Constitution; Act 13 of 1896 was constitutional; the Act of 1894 does not violate Arts. 1, 5, 7, 11, 30 *et seq.*, of the Constitution. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

[3] The right to practise medicine is not a natural right. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

[4] The medical profession is subject to legislative control. The legislature has the right to require an examination as to qualifications. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

entering upon the practice of medicine in any of its branches,[1] dentists excepted, shall present to the board of medical examiners a diploma[2] from a medical college in good standing, said standing to be determined by the board, and shall pass a satisfactory examination[3] before the board, upon anatomy, physiology, chemistry, principles of medicine, obstetrics, physical diagnosis, surgery, materia medica, and hygiene, and shall satisfy the board that he or she is twenty-one years of age, of good moral character, and possesses at least a fair primary education. If said diploma and examination are satisfactory to the board, they shall issue a certificate in accordance with the facts (*ib.*, s. 2).

The certificate of either board shall be conclusive proof of the efficiency of the applicant (*ib.*, s. 3).

Midwives.—Provision was made in the act for the registration within ninety days after its passage, of midwives practising as such at the time of its passage, and the issue of a certificate entitling the holder to practise midwifery in the parish in which the certificate was issued (*ib.*, s. 5).

All persons beginning the practice of midwifery in the State after the passage of the act (1894) shall appear before one of the State boards of examiners and submit to such examination in midwifery as the board shall require; if such examination is satisfactory, on receipt of $5 the board shall issue a certificate which shall be registered with the secretary of the board of health in the parish of Orleans and with the clerk of the district court in the other parishes of the State, in the manner provided for physicians. This section does not apply to the so-called midwife of rural districts and plantation practice, who, for the purposes of this section, are not considered as practising midwifery as a profession (*ib.*, s. 5).

Temporary Certificate.—One member of a board of medical examiners may grant a permit after satisfactory examination to any applicant; such temporary permit shall not continue in force longer than until the next regular meeting of the boards, but such permit shall in no case be granted within six

[1] The legislature has not by this act discriminated against the eclectic school of medicine. *Ib.*

[2] See p. 281, n. 1.

[3] A board's abuse of its power does not render the act unconstitutional. Board of Medical Examiners *v.* Fowler, *supra*.

Admission to practise in another State is not a vested right. *Ib.*

months after the applicant has been refused a permit by the boards (*ib.*, s. 8).

RECORDING.—Certificates issued under section 2 shall be recorded in the office of the clerk of the district court of the parish in which he or she resides, who shall certify to such recordation by indorsement on the original certificate, which the holder shall transmit or deliver to the State board of health. Such certificate transmitted or delivered to the State board of health shall entitle the holder to be placed on the list of registered physicians and surgeons. Said board of health shall preserve such certificates, and a copy thereof signed by its secretary shall be received as evidence in the courts. Until such recordation, the certificate holder shall not exercise any of the rights or privileges therein conferred to practise medicine (*ib.*, s. 9).

PUBLICATION OF LIST.—The State board of health is required to publish annually in the official State journal (or, if there be no such journal, then in a daily newspaper in New Orleans), a list of the registered physicians and surgeons and their residences. Such published list shall be received in evidence in the courts as proof that the physicians and surgeons therein named are duly registered. Said board is required to strike from said list the name of any person whose certificate may have been revoked by the State boards of medical examiners (*ib.*, s. 10).

CIVIL DISABILITIES.—A practitioner of medicine in any of its departments failing to comply with this act shall not be exempt from jury or military duty, nor be permitted to collect fees or charges for services rendered, nor be allowed to testify as a medical or surgical expert in any court in the State, nor to execute any certificate as physician or surgeon, nor to hold any medical office, nor to be recognized by the State, or parish, or municipal corporation, as a physician or surgeon, nor entitled to enjoy any of the privileges, rights, or exemptions granted to physicians and surgeons by the laws of this State (*ib.*, s. 16).[1]

ITINERANT VENDERS.—Any itinerant vender of any drug, nostrum, ointment, or application of any kind, intended for the treatment of disease or injury, or who may, by writing, print, or other methods, profess to cure or treat disease or deformity by any drug, nostrum, manipulation, or other expedient, in the

[1] The legislature was empowered to prescribe these penalties. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

State, shall, if found guilty, be fined not less than $25 nor more than $100 for each offence, to be recovered in an action of debt, before any court of competent jurisdiction, or imprisoned not less than ten nor more than thirty days, or be both fined and imprisoned (*ib.*, s. 12).[1]

DEFINITION.—Any person shall be regarded as practising medicine in any of its departments who shall append the letters M.D. or M.B. to his or her name, or repeatedly prescribe or direct, for the use of any person or persons, any drug or medicine or other agency for the treatment, cure, or relief of any bodily injury, infirmity, or disease. This act shall not apply to farmers and planters when exclusively practising without compensation on their employees and tenants (*ib.*, s. 13).

PENALTY.—If a person practise medicine in any of its departments without first obtaining the certificate, or contrary to the provisions of this act, the board (*sic!*) of medical examiners created by this act may through their respective presidents cause to issue in any competent court a writ of injunction,[2] forbidding

[1] Section 12 and section 14 of the Act of 1894 are not inconsistent, and they are not rendered so by Act 13 of 1896; both sections continue in force, section 12 as it was, and section 14 as amended; therefore an indictment will lie under section 12, notwithstanding the amendment of section 14 by Act 13 of 1896, which changed the process for enforcing section 14 from criminal to civil. State ex rel. District Attorney *v.* Judge, 105 La., 371.

PRACTICE. — Whether convictions under section 12 are reviewed by appeal, certiorari, or prohibition, see State *v.* Pettigrew, 109 La., 131; 33 So. R., 110; State ex rel. Pettigrew *v.* Hall, 109 La., 290; 33 So. R., 318.

If the defence to an information under section 12 is that accused is engaged in interstate commerce, it is a matter of fact to be taken notice of only after proof. State ex rel. Pettigrew *v.* Hall, 109 La., 290; 33 So. R., 318.

Section 12 is not class legislation; its object is expressed in the title of the act, and the act does not embrace more than one subject. State *v.* Hall, 109 La., 290; 33 So. R., 318; citing State *v.* Lee, 106 La., 400; 31 So. R., 14.

Provisions relating to venders who undertake to prescribe and effect cures with the nostrums which they sell are as germane to the purpose of an act to protect the public from unskilled and incompetent practitioners as the provisions relating to persons who without having their qualifications tested undertake to treat disease by the use of compounds sold by others. State ex rel. Wynne *v.* Lee, 106 La., 400.

The itinerant vender professing to treat and cure disease is placed in a class by himself; he is not regarded as a practitioner of medicine, yet by undertaking to treat disease, being presumably unskilled and incompetent, he is within the scope and purpose of the act. State ex rel. Wynne *v.* Lee, 106 La., 400.

[2] The board is empowered to test the facts through injunction. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

It is defendant's duty, when his right is called in question, to show that he is acting under legal authority. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

and enjoining said person from further practising medicine in any of its departments in the State until such person shall first have obtained the certificate provided (*ib.*, s. 14, as amended Act 1896, No. 13, s. 1). Said injunction shall not be subject to be released on bond, and in the same suit the boards may sue for and demand a penalty not to exceed $100, and attorneys' fees not to exceed $50 and costs, judgment for which may be rendered in the same judgment in which the judgment may be made absolute; the trial shall be summary, by the judge, without a jury (*ib.*).

REVOCATION OF CERTIFICATES.—The boards may revoke any permit or certificate issued by them, whenever it shall appear that the physician has been convicted of immoral conduct, before a competent court (Act 49, 1894, s. 15).

EXCEPTIONS.—This act shall not apply to any commissioned surgeons of the United States army, navy, or marine hospital service, to physicians or surgeons from other States or Territories in actual consultation with a registered physician of this State, nor to any physician actually practising in this State[1] before the passage of this act (1894) and in accordance with then existing laws (*ib.*, s. 17).

FEES.—To boards of examiners for issuing certificate, $1; for examination, $10; if applicant fails to pass and no certificate issues, $5 only of said fee is to be retained (*ib.*, s. 11).

To treasury of boards for certificate of temporary permit, $5, to be credited when applicant applies for permanent permit (*ib.*, s. 11).

To board of examiners for certificate to midwife, $5 (*ib.*, s. 5).

For registration of midwife's certificate, 50 cents (*ib.*, s. 5).

To clerk for recording physician's certificate, $1 (*ib.*, s. 9).

To State board of health, for copy of original certificate, 50 cents (*ib.*, s. 9).

LICENSE TAX.—Every individual or individuals carrying on the business or profession of physician shall be graded (as set forth in the act) according to gross annual receipts, and shall pay an annual license tax (for the rates see the act), but no license is

[1] Practice before the passage of a law does not entitle the practitioner to continue to practise without procuring the certificate required by law. Board of Medical Examiners *v.* Fowler, 50 La. Ann., 1,358.

issued for less than $5 (Act 1898, No. 171, as amd. Act 103, 1900, Wolff's Rev. Laws La. 1904, p. 1,708).

MAINE.*

*See Appendix, p. 691.

THE BOARD OF REGISTRATION OF MEDICINE shall be appointed by the governor with the advice and consent of the council; it shall be composed of six persons, residents in the State, graduates of a legally chartered medical college or university having the power to confer degrees in medicine, and actively employed in the practice of their profession for a period of five years (Rev. St. 1903, p. 238, s. 9). No member of the board shall belong to the faculty of any medical college or university (*ib.*).

The board shall hold regular meetings in March, July, and November in each year, and such additional meetings at such times and places as it may determine (*ib.*, s. 10). The board shall keep a record of the names and residences of all persons registered, which, or a duplicate, shall always be open to inspection in the office of the Secretary of State during regular office hours (*ib.*, s. 13). The board, its members or agents, shall investigate all complaints regarding non-compliance with or violation of the provisions of this chapter, and shall bring all such cases to the notice of the proper prosecuting officers (*ib.*, s. 14).

EXAMINATIONS.—The board shall examine all applicants for registration as licensed physicians or surgeons. Each applicant must at least seven days before his examination present to the secretary of the board an application, under oath or affirmation, giving satisfactory proof of being twenty-one years of age, and of having good moral character, and of being a graduate of some reputable medical school or college having power to confer degrees in medicine, and in good standing and maintaining a standard of preliminary education and of medical instruction approved by the board. He must also present such other facts as the board in its blank application may require and must pay the fees provided in the preceding section (see below, sec. 11, and title FEES). Examinations shall be in whole or in part in writing, and of elementary and practical character, and shall embrace the general subjects of anatomy, physiology, pathology, materia medica, therapeutics, surgery, the principles and

practice of medicine, obstetrics, or such branches thereof as the board may deem necessary for the applicant to possess (*ib.*, s. 12).

QUALIFICATION.[1]—Any person shall, on payment of a fee of $10, be entitled to examination, and, if found qualified by a majority of the members of the board present, shall be registered as a physician or surgeon and shall receive a certificate thereof under seal of the board and signed by the chairman and secretary, which shall state the facts and must be publicly displayed at the person's principal place of business as long as said person continues such practice for gain or hire.[2] A person refused registration may be re-examined at any regular meeting of said board within two years of the time of such refusal without additional fee, and thereafter may be examined as often as he may desire upon the payment of the fee of $10 for each examination (*ib.*, s. 11).

DUEL.—A person who is present at a duel as surgeon, though no homicide ensues, is punishable by imprisonment for not more than twenty years, or by fine not exceeding $1,000, and is incapable of holding any office or place of honor, trust, or profit for twenty years after conviction (Rev. Stats. 1903, c. 119, s. 10).

RECIPROCITY.—The board may make such rules and regulations as may be necessary for reciprocity of licensure with the boards of other States which maintain a standard of education at least equal to their own; but no such rules shall become operative until they have been approved by a justice of the supreme judicial court (Rev. Stats. 1903, c. 17, s. 12).

INVESTIGATION.—The board, its members, or agents shall investigate all complaints regarding non-compliance with or violation of the provisions of this chapter relating to the registration of physicians and surgeons, and shall bring all such cases to the notice of the proper prosecuting officers (*ib.*, s. 14).

REVOCATION—SUSPENSION.—Said board, after conviction before a proper court, for crime in the course of professional

[1] On method of proving attendance at a medical school and the holding of a diploma therefrom (under a former law), see Holmes *v.* Halde, 74 Me., 28 (1882).

[2] Where a town physician sues a town for money received by the town to be applied as compensation for his services, which in equity and good conscience the town ought not to retain, the town cannot escape payment on the ground that there is want of plenary proof of the plaintiff's qualification as a physician; such a suit is not a suit for medical services as such. Fletcher *v.* Inhabitants of Belfast, 77 Me., 334.

business, and after hearing, may by unanimous vote revoke any certificate issued by them and cancel the registration. It may suspend or revoke any certificate by unanimous vote where it has been wrongfully obtained or any fraud connected with the said registration (*ib.*, s. 14).

OFFENCE.—No person unless duly registered by said board shall practise medicine or surgery or any branch thereof for gain or hire (*ib.*, s. 15).[1]

PENALTY.—Whoever[2] not being registered shall so practise or shall advertise or hold himself out to the public as a physician or surgeon, who appends to his name the letters "M.D.," or who uses the title of a doctor or physician, meaning thereby a doctor of medicine, shall be fined not less than $100 nor more than $500 for each offence, or be imprisoned for three months, or both (*ib.*, s. 15).[3]

EXCEPTIONS.—Sections 9 to 15 inclusive shall not apply to commissioned officers of the United States army, navy, or marine hospital service, or to a physician or surgeon who is called from another State to treat a particular case and who does not otherwise practise in this State,[4] nor to prohibit gratuitous service or the rendering of assistance in emergency cases, nor to midwives who lay no claim to the title of physician or doctor. Nor to clairvoyants[5] or persons practising hypnotism, magnetic heal-

[1] On rights of licensees of Maine Medical Society to recover fees under former laws, see Towle *v.* Marrett, 3 Me., 22 (1824).

A person who complied with a former law (1838, c. 53) after the rendition of his services, but before institution of his suit, could not recover compensation for services rendered prior to compliance with the law. Thompson *v.* Hazen, 25 Me., 104 (1845). See p. 411, n. 2, *infra*.

[2] A licensee of the Maine Eclectic Society was not entitled to continue to practise without complying with the provisions of Act 1895, c. 170 [now embodied in c. 17, R. S., 1903]. State *v.* Bohemier, 96 Me., 257 (1902).

[3] The Act 1868, c. 567, incorporating the Maine Eclectic Society with "such powers and privileges as pertain to other like corporations," contained no contract that its members or licensees should be exempt from such rules and limitations or conditions as the legislature might from time to time find necessary to impose on practitioners of medicine for the better protection of health. But if it had, the legislature reserved full power to revoke any privilege therein granted, and the Act of 1895, c. 170 [now embodied in c. 17, R. S., 1903] did not impair the obligation of any contract with the Maine Eclectic Society or its members. State *v.* Bohemier, 96 Me., 257 (1902).

[4] The fourteenth amendment, United States Constitution, does not prohibit reasonable discrimination based on requirements of the public health or morals. The distinction in favor of practitioners from other States is not arbitrary; it is clearly required by circumstances and the purpose of the act, the health of the people. State *v.* Bohemier, 96 Me., 257 (1902).

[5] Under a former law (R. S., 1871, c. 13, s. 3) the services of a *clairvoyant* who visited and prescribed for the

ing, mind cure, massage, Christian science, so called, or any other method of healing, if no poisonous or dangerous drugs are employed nor surgical operations performed, provided such clairvoyants or other persons do not violate any of the provisions of section 15 in relation to the use of "M.D." or the title of doctor or physician (*ib.*, s. 16). (See Appendix, p. 692.)

FEES.—For examination under section 11, $10 (*ib.*, s. 11).

MARYLAND.[1]

QUALIFICATIONS.—After the first day of July, 1894, no person[2] shall practise medicine or surgery unless he or she shall be duly registered as physician or surgeon in accordance with [subtitle, "Practitioners of Medicine," of Article 43, Code Pub. Gen. Laws][3] (Poe's Code Pub. Gen. Laws 1903, s. 82).[4]

sick were held to be *medical services*, for which she was not entitled to compensation without the certificate required by law to be obtained before recovery of compensation for medical or surgical services. Bibber *v.* Simpson, 51 Me., 181 (1871).

[1] For some allusions to the early law of Maryland of 1798, see p. 219, n. 2.

There was an evident want of care and of a well-defined system at the beginning (1888), and the subsequent amendments and additions appear to have been suggested by original imperfections. Manger *v.* Board of Examiners, 90 Md., 659.

For analysis and history of the acts as they existed in 1900, see Manger *v.* Board of Examiners, 90 Md., 659; and Scholle *v.* State, 90 Md., 729.

On the purpose of the acts, see Scholle *v.* State, 90 Md., 729.

The Court finds nothing in the statutes obnoxious to any constitutional objection (*ob. dic.?*). Scholle *v.* State, 90 Md., 729 (1900).

There was an act of Maryland as early as 1798 (Act 1798, c. 105), imposing a fine for practising without a license from the medical board of examiners for the State of Maryland, obtained after examination or the production of a diploma from some respectable college. See Regents *v.* Williams, 9 Gill & J. (Md.), 365 (1838), at p. 384.

[2] The classification must be created upon considerations only that are promotive of public interests. Scholle *v.* State, 90 Md., 729.

[3] The Law of 1894, c. 217, s. 1, 47, from which this is taken, had, instead of the words in brackets, "this act"; the law was codified 1903 by John P. Poe, Esq., and the words in brackets substituted; the codification of 1903 was not enacted as law, but by Act 1904, c. 72, Mr. Poe's code was *legalized* and "shall be deemed and taken . . . to be *evidence* of the Public General Laws, *provided* before the same be published the Public General Laws of the session of 1904 be incorporated therein." This abstract is taken from the code as published in 1903, because at time of going to press the publication provided in this act of 1904 has not been made. What is the effect of a provision where the said code differs from the act as originally passed may be a subject of speculation. It would seem, however, that in this particular instance it is immaterial; for though section 82 is retained in the new code, it seems to be superseded in effect by section 67. N.B.—Poe's Code, 1904, makes no change in the medical law.

[4] In the exercise of the police power the right of the General Assembly to regulate the practice of medicine cannot be disputed or denied. Manger *v.* Board of Examiners, 90 Md., 659; Scholle *v.* State, 90 Md., 729.

See n. 1, *supra*.

All persons practising[1] medicine or surgery, or hereafter beginning the practice in any of their departments, except dentistry, shall possess the qualifications required by sub-title "Practitioners of Medicine," of Article 43, Code Public General Laws (Poe's Code Pub. G. L. 1903, Art. 43, sub-title "Practitioners of Medicine," s. 67).[2]

Registration—Prosecution.—The Act of 1902, c. 612[3] (Poe's Code Pub. Gen. Laws 1903, art. 43, s. 69) provided that on the first Tuesday in June each year each board should appoint a secretary-treasurer, and that within sixty days from his appointment the clerk of the circuit court of Baltimore City and of each county should furnish to him a list of all physicians legally registered in such court; to all those physicians who at that time have been practising without being legally registered, he shall send a printed notice of the section of this article relating to the duty of the police commissioners in Baltimore City and the sheriffs of the counties under this law; and within four months after his appointment he shall see that all physicians entitled to register have been registered, and that the names of all those not entitled to be registered have been presented for prosecution to the State's attorney of Baltimore City and of each county in which the accused respectively reside. Those physicians entitled to register under this sub-title who yet have failed to comply at the expiration of such four months shall also be prosecuted.

No one after April 11th, 1902, shall be allowed to practise medicine or surgery without being duly registered according to the provisions of this sub-title (Act 1902, c. 612; Poe's Code Pub. Gen. Laws 1903, art. 43, s. 69).[4]

[1] See p. 289, n. 2.

[2] See p. 289, notes 4, 1.

On the curious effect of the successive acts of 1888, c. 429, 1894, c. 217, 1896, c. 194, on those who were practising in 1896 in violation of the previous laws, see Manger *v.* Board of Examiners, 90 Md., 659. It would seem that under the present law this is now merely matter of curious interest, as it would seem that the law of 1902, c. 612, was passed to obviate the difficulties disclosed by Manger *v.* Board of Examiners.

[3] For analysis of former law (1888, c. 429), see Manger *v.* Board of Examiners, 90 Md., 659.

[4] On a judicial attempt to read intelligence into the chaos introduced by the Act of 1896, c. 194, s. 62, as it was punctuated, see Manger *v.* Board of Examiners, 90 Md., 659; it would seem that this chaotic condition was rectified by s. 43, c. 612, Act 1902 (Poe's Code P. G. L. 1903, art. 43, s. 69), but whether it was or not is a question not yet raised or settled in the published reports of judicial decisions.

The secretary-treasurer of each board shall call to the attention of the State's attorneys of Baltimore City and of the different counties all violations of this sub-title (*ib.*).

He shall keep the examination papers of applicants for at least three years after they have been passed upon by the board, after which they are to be destroyed; and he shall keep a complete list of all registered physicians in the entire State (*ib.*).

FORMER PRACTITIONERS.[1]—Every person who was practising medicine in the State before June 1st, 1892,[2] shall be entitled to be registered as physician or surgeon or both on making application to the president of either board of State medical examiners, in writing, verified by the oath of the applicant, before any officer entitled to administer oaths under the law of the State, stating that the applicant was a duly qualified lawful practitioner of medicine in good standing actually engaged in the practice of such profession in said State before June 1st, 1892.[1] On receiving said application and being satisfied of the truth of said statement therein, said president[3] shall issue or indorse his permit for such applicant to be registered upon a copy of such application,[4] which permit shall be countersigned by the secretary of the board; such president may make inquiry and examine witnesses under oath or receive other evidence as to the truth of the statements. If the president of either board shall act on such application and refuse it, no president of the other board shall entertain or act on any application of such applicant for such permit. On the presentation of such a permit to the clerk of the county where the applicant may reside, or to the clerk of the Circuit Court of Baltimore City, if said applicant shall reside in said city, the clerk shall register such application and permit and the name of such applicant as physician or surgeon or both, and a certified copy of such entry of registration under the seal

[1] Under the law as it existed prior to c. 612, 1902, a person entitled to register as a former practitioner could not be rejected by a president of a board solely because he had no diploma from a medical college. Manger *v.* Board of Examiners, 90 Md., 659.

[2] The Act of 1892, c. 296, was intended to apply to persons commencing the practice of medicine after the passage of the act. Manger *v.* Board of Examiners, 90 Md., 659.

[3] It is for the president of the board and not for a court to pass upon the truth of the facts presented to him, in the exercise of a *bona fide* discretion; but where he fails or declines to examine into the facts, the applicant is entitled to a mandamus, to compel him to do so. Manger *v.* Board of Examiners, 90 Md., 659.

[4] *Sub-title* is substituted in Poe's Code for "act." See note 3, p. 289, *supra*.

of the court shall be legal evidence of such registration in all the courts of the State (Act 1896, c. 194, ss. 1, 54, Poe's Code P. G. L. 1903, s. 83).[1]

EXCEPTIONS.—The provisions of this [sub-title] shall not apply to those practising medicine in the State prior to June, 1892, who registered as practitioners of medicine prior to July, 1894 (*ib.*).[2]

LICENSE.—All persons[3] who have commenced to practise medicine or surgery in the State since June 1st, 1892, or who shall hereafter commence to practise medicine or surgery in the State, shall not be entitled to register in the registry of physicians and surgeons, except on filing with the clerk of the circuit court of the county or city in which he or she shall reside a license from one of the duly constituted boards of medical examiners in accordance with the terms of sections 77 and 78, except that physicians and surgeons who have come into the State since June 1st, 1892, or who may hereafter come into the State to follow the practice of medicine and surgery, may receive a license which shall entitle them to be registered as physicians and surgeons in accordance with law on application to one of the duly constituted boards of medical examiners, in accordance with the provisions of section 85 of this act (Act 1894, c. 217, ss. 1, 55; Poe's Code P. G. L. 1903, s. 84).

Physicians and surgeons of good moral and professional standing, who shall hereafter come into this State with intent to follow the practice of "medicine and surgery" within the State, being graduates of a medical college or university of good standing, or having a certificate or license from a board of medical examiners of any State where the requirements for practice are equal to those required by the board named in this [sub-title,][4] may make application to the president[5] of either board of medical examiners, under oath, stating when and how long said applicant has been engaged in the practice of medicine and surgery, and from what medical college, university, or other

[1] Upon effect of Act of 1896, c. 194, on prior law, see Manger *v.* Board of Examiners, 90 Md., 659.

See p. 290, n. 2.

[2] The words in brackets are substituted in Poe's Code for the word "act" in Law 1896, c. 194, s. 1, 54. See note 3, p. 289, *supra*.

[3] See p. 289, n. 2.

[4] The words in brackets are substituted in Poe's Code for the word "article" in Law 1894, c. 217, s. 1, 56, as amended 1896, c. 194, s. 1, 56. See note 3, p. 289, *supra*.

[5] See p. 291, n. 3.

institution of learning he or she has graduated. Thereupon the board shall have the authority and discretion to require applicants to undergo an examination in accordance with the provisions of sections 70 to 76 inclusive,[1] or may require the applicant to submit to a special examination, the terms and methods of which shall be prescribed by the board and on paying the fee set out in section 75. After the examination and determination of said board thereupon that said applicant is qualified to practise medicine and surgery and that he is entitled to a license, a license shall be issued to him, which shall be filed and recorded as provided by section [78],[2] and it shall be the duty of the clerk of the court to register the name of the person so licensed as physician or surgeon or both, in accordance with the provisions of this [sub-title][3] (Act 1894, c. 217, s. 1, 56, as amended 1896, c. 194, s. 1, 56).

All persons whose licenses have been heretofore filed and recorded in accordance with section [78][4] shall be held to be duly registered physicians within the provisions of section [83], and all persons who shall hereafter receive and file licenses, to be recorded in accordance with section [78], shall be registered as physicians and surgeons under said section (Act 1894, c. 217, s. 1, 57; Poe's Code P. G. L. 1903, s. 86).

Improper Registration.—Any citizen of Maryland having information which causes him to believe that any person has been heretofore wrongfully and improperly registered as a physician or surgeon or both, upon his application to the clerk of any court, may apply by petition to the circuit court of the county wherein such registration was made, or to the city court of Baltimore City, if such registration was in Baltimore City, under oath, stating that the petitioner is informed and believes that the person named therein has been heretofore improperly and wrongfully registered as physician or surgeon or both upon his own application and affidavit upon the register of physicians or book kept for such purpose in any court of this State, for the reason (as said petitioner is *empowered* [*sic!*]) that such person

[1] "*70 to 76*" inclusive are substituted in Poe's Code for 41 *or* (*sic!*) 47 inclusive of this article" in Law 1894, c. 217, s. 1, 56, as amended 1896, c. 194, s. 1, 56. See note 3, p. 289, *supra*.

[2] *78* is substituted in Poe's Code for "47 of this article." See note 3, p. 289, *supra*.

[3] See p. 291, n. 4.

[4] *78* is substituted in Poe's Code for "48 of this article"; 83 is substituted for 53, and 78 for 48. See note 3, p. 289, *supra*.

was not lawfully practising medicine in the State of Maryland, as a duly qualified practitioner of medicine in said State, entitled to be registered as a physician or surgeon upon his own application to the clerk of said court, and that said petitioner prays that the name of such person shall be struck from the registry of physicians aforesaid (Act 1896, c. 194, s. 1, 61; Poe's Code 1903, art. 43, s. 89). The procedure and final order to be passed thereon are regulated in detail by the section. The decision upon such petition shall have no force and effect in any criminal prosecution under this [sub-title][1] (*ib.*).

Prosecutions.—It shall be the duty of the Police Commissioners of Baltimore city and of the Sheriff of each county in the State to see that all practising physicians in the State shall be legally registered according to the provisions of this [sub-title],[1] and to report to the State's attorney of the city or county all cases of the violation of the provisions of this [sub-title][1] (Act 1902, c. 612, s. 1, s. s. 61, A; Poe's Code P. G. L. 1903, art. 43, s. 91).

Board of Examiners—Examinations.—There are two separate boards of examiners, respectively, representing the Medical and Chirurgical Faculty of the State of Maryland[2] and the Maryland State Homœopathic Medical Society; each consists of eight members, appointed respectively by those societies,[3] physi-

[1] *Sub-title* is substituted in Poe's Code for "article." See note 3, p. 289, *supra*.

[2] The commission to the Medical and Chirurgical Faculty of the State of Maryland of the duty of appointing one of the boards of examiners does not render the act unconstitutional; the legislature can confer upon a private corporation powers and duties conferred for the public good. Scholle *v.* State, 90 Md., 729; citing The Regent's Case, 9 Gill & J., 388; and Slaughter Houses cases, 83 U. S., 36.

On the early acts, granting the right to the Medical and Chirurgical Faculty to name a board of medical examiners (*e.g.*, Act 1798, c. 105), and to the regents of the College of Medicine (1807, c. 53) to grant certificates of admission to the office and profession of surgeon, and whether the latter dispensed with a license, and whether the rights of the Medical and Chirurgical Faculty were vested rights, see Regents *v.* Williams.

Where, under an early law (1798, c. 105), the power to name a board of examiners to license practitioners was conferred on the Medical and Chirurgical Faculty (a corporation), this was not a franchise or vested right, and the legislature could change the laws providing for a license. Regents *v.* Williams, 9 Gill & J., 365.

For discussion of the nature of a college of physicians and surgeons, entrusted with the licensing of physicians, and the determination that it is a private and not a public corporation, see Regents *v.* Williams, 9 Gill & J. (Md.), at p. 399.

[3] The method of appointment of the medical boards does not violate the State Constitution. Scholle *v.* State 90 Md., 729.

cians actually engaged in the practice of medicine or surgery in the State, and of recognized ability and honor; but no member of any medical college or university who passes upon the qualifications of graduates of any medical school shall be eligible as a member of either board (Poe's Code P. G. L. 1903, s. 68; Act 1902, c. 612, s. 1, sub. s. 40). Each board has the exclusive right to examine [and?] pass upon the qualifications of and license of its own applicants (*ib.*).

For the purpose of examining applicants each board shall hold one or more stated or special meetings each year, due notice of which shall be made public at such times and places as may be determined by the members thereof respectively. At said meetings a majority of the members of the board shall constitute a quorum. Each board shall keep an official register of all applicants for examination for a license, said register to show name, age, and last place of residence of each candidate, the school from which he or she may have graduated, and whether such applicant was rejected or licensed; but such matters shall not be written in said register or made public until after the examination (Poe's Code P. G. L. 1903, art. 43, s. 70).

Examinations and License.—At the first meeting of each board or at a stated or special meeting held subsequently, suitable provision must be made by each examining board to prepare a schedule of written examination upon anatomy, physiology, medical chemistry, surgery, practice of medicine, materia medica, therapeutics, obstetrics, and pathology; the same standard of excellence is required from all candidates. In therapeutics and practice, the questions must be in harmony with the tenets of the school selected by the candidate, and the standard of requirements therein is established by each board for itself. When members are necessarily absent from any meeting for the examination of applicants for licenses, suitable temporary provision must be made for thorough examination in each and all of said subjects by the members present. The examination must be fundamental in character (*ib.*, s. 71).

The votes of all examiners present shall be yes or no, written with their signature upon the backs of the examination papers of each candidate for the respective branches (*ib.*).

All persons, except physicians who were practising medicine

in the State prior to January 1st, 1898, who are now (Act 1902, c. 612, April 11th, 1902) practising medicine or surgery and can prove by affidavit that within one year of said date said physician had treated in his professional capacity at least twelve persons, who shall commence the practice of medicine or surgery in any of their branches after April 11th, 1902, shall make written application for license to the president of either board of medical examiners which the applicant may elect, with satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character, has obtained a competent common-school education, and has either received a diploma conferring the degree of Doctor of Medicine from some legally incorporated medical college in the United States, or a diploma[1] or license conferring the full rights to practise all the branches of medicine and surgery in some foreign country. Said diploma, if from a college in the United States, must have been conferred by a legally incorporated college requiring a four years' standard of education as defined by the American Medical College Association or the intercollegiate committee of the American Institute of Homœopathy respectively; provided that this requirement shall not apply to any physician who shall, prior to April 11th, 1902, have practised outside of the State for at least three years and who shall have been duly registered or licensed in the place where he has so practised; provided, further, that two courses of medical lectures, both of which shall be either begun or completed within the same calendar year, shall not satisfy the above requirements; provided also that in the case of students, who, on April 11th, 1902, shall be in the second year in a medical college, a three years' course of study, or attendance on three courses of lectures delivered in different years, shall satisfy said requirements. Proof of the qualification of applicants as above shall, if required, be made by affidavits at the time of the making of said application and payment of fee as provided. The president[2] of the board, if satisfied, must direct the secretary-treasurer to issue an order for examination, and when the applicant shall have passed an examination as to proficiency satisfactory to the board, the president must grant a license to practise medicine and surgery (*ib.*, s. 72).[3]

[1] See p. 291, n. 1.

[2] See p. 291, n. 3.

[3] If a person is entitled to the permit or certificate demanded by him,

If the president of either board shall have refused any application, either for want of qualifications necessary to entitle the applicant to examination or for want of proficiency on being subjected to examination, neither president shall entertain or pass upon a subsequent application from said applicant until six months after such rejection (*ib.*).

The boards are authorized to license without examination applicants who present proper certificates of proficiency and professional standing at the time of application issued by boards of medical examiners of the District of Columbia and other States, whose requirements are of as high a standard as those governing the boards of this State; provided such boards grant the same privileges to licentiates of the examining boards of Maryland; such applicants, however, being still required to furnish the same proof of qualifications required of other applicants by this section (*ib.*).

Medical students at the end of their second year of study who have, as verified by the certificate of the dean of the college which they have attended, completed the studies of anatomy, physiology, medical chemistry, and materia medica in said college, shall on application be examined in such studies by the State licensing board, the result of such examination to be considered as part of the final examination, the full regular fee to be paid at this time, no part thereof to be returned, but placed to their credit for the remainder of the examination yet to be taken.

Medical students who have, as verified by the certificate of the dean of the college which they have attended, completed a full four years' course of studies and lectures, but who have not yet received their diplomas, shall upon application be examined in all the branches enumerated in section 71 by the State licensing board, the final certificate and license of the board being withheld until the diploma of the proper medical college, with the candidate's name inscribed, be produced to the secretary of the board. Diplomas presented by graduates of foreign colleges shall be accepted if a course of four years' study has been required by said foreign college before issuing such diploma (*ib.*, s. 72).

and the board refuses it, he is entitled to a writ of mandamus against the board. Manger *v.* Board of Examiners, 90 Md., 659 (1900).

Reciprocal Provisions Respecting District of Columbia.—Any physician who may change his residence from the District of Columbia to Maryland, or who while living in the District of Columbia shall desire to practise medicine or surgery in Maryland, shall, on application to the examining board of the State of Maryland, be entitled to a license without fee and without examination; provided the application be properly indorsed at the time it is presented, by the examining board of the District of Columbia, certifying to the proficiency and professional standing of the applicant, and provided, further, that the examining board of the District of Columbia shall, under the laws thereof, grant like and equal privileges to licensed physicians of Maryland who may remove to the District, or, while continuing to reside in Maryland, may desire to practise in the District (*ib.*, s. 73).

Examinations (continued).—All of the examinations are conducted so that the name, school of graduation, and preparatory training of the applicant shall not be made known to the board till his examination papers have been graded. An applicant receiving a majority of the votes of the board before whom he appears is considered to have passed a satisfactory examination and is entitled to a license (*ib.*, s. 74).

The board must refuse a license to an applicant radically deficient in any essential branch. In case of a failure, the candidate shall not be permitted to take another examination before either board until after six months from the date of his rejection; provided that any applicant who has, during the year before April 11th, 1902, or who shall thereafter, so fail shall be credited as having passed in such branches as he has or shall have been found proficient in, and he shall not be again examined in said subjects (*ib.*, s. 76).

Filing.—A license, or a certified copy, must be filed with the clerk of the circuit court of the county in which the licensee may reside, or with the clerk of the Circuit Court of Baltimore City if the licensee reside therein; the number of the book and page containing the recorded copy must be noted in the body of license (*ib.*, s. 78, as amd. Act 1904, c. 690).

Removal.—If after such record of the license, the licensee permanently remove his or her residence to some other part of the State, he must thereupon at once file said license or a certified

copy for record with the clerk of the Circuit Court in the county to which he removes, or in the said Circuit Court clerk's office of Baltimore City, if he removes there (*ib.*).

EVIDENCE.—The records have the same weight as evidence that is given to the record of conveyances of land (*ib.*).

CERTIFICATES OF PROFESSIONAL STANDING.—Said board shall upon request issue certificates of professional standing to physicians moving out of the State (*ib.*, s. 81).

DEFINITION.[1]—Any person shall be regarded as practising medicine within the meaning of this [sub-title] [2] who shall operate on or prescribe for any ailment of another, or who shall append to his or her name the letters M.D., or prefix the word Doctor or the abbreviation Dr. to his or her name, with the intent thereby to imply that he or she is a practitioner of medicine or surgery (Act 1902, c. 612, s. 61; Poe's Code Pub. Gen. Laws, art. 43, s. 90).

EXCEPTIONS.[3]—Nothing in the DEFINITION (s. 90, *supra*) contained applies to gratuitous services, nor to any resident or assistant resident physicians or students at hospitals in the discharge of their hospitable [*sic!*] or dispensary duties, or in the office of physicians, or to any physician or surgeon from another State, Territory, or district in which he resides when in actual consultation with a legal practitioner of this State; nor to commissioned surgeons of the United States army, navy, or marine hospital service, or to chiropodists, or to midwives, or to masseurs or other manual manipulators who use no other means;

[1] The necessity of repunctuating Act of 1896, c. 194, s. 62, as published, in order to make it intelligible, is made apparent by Manger *v.* Board of Examiners, 90 Md., 659. As the definition which it contained appears to have been wholly changed by Act 1902, c. 612, s. 1, s. s. 61 (Poe's Code P. G. L., 1903, art. 43, s. 90), the perplexity involved in the former law appears to have been obviated. See n. 2, p. 289; n. 4, p. 291.

[2] See p. 289, n. 4.

[3] A discrimination based wholly on residence in one place for a certain time would be wholly arbitrary (*ob. dic.*). Scholle *v.* State, 90 Md., 729; citing State *v.* Pennoyer, 65 N. H., 113; 5 L. R. A., 709.

Discrimination in favor of physicians of the United States service, physicians in consultation from other States, and temporary practitioners under supervision of preceptors [the latter not now embraced in the exceptions], are of a public character; the army and navy surgeons have their competency established by the exactions before they enter the service, marine hospital surgeons are selected for their special adaptation to their particular work, the remaining classes are not practitioners within the State; the exemption (as it existed in 1900) is not arbitrary or unjust, and the act does not therefore violate the fourteenth amendment to the United States Constitution. Scholle *v.* State, 90 Md., 729.

nor shall the provisions of this [sub-title][1] apply to physicians or surgeons residing on the borders of a neighboring State and duly authorized under the laws thereof to practise medicine or surgery therein, whose practice extend [*sic!*] into the limits of this State; provided such practitioners shall not open an office or appoint places to meet their patients or receive calls within the limits of this State without complying with the provisions of this [sub-title],[1] provided the same privileges be accorded to licensed physicians of this State (nothing in this sub-title annuls any provisions of the title "Dentistry"); nor shall apply to any registered graduate of dental surgery now (1902) practising in the State of Maryland with the sign titles: dentist, surgeon dentist, dental surgeon, or stomatologist (Act 1902, c. 612, s. 1, sub. s. 61; Poe's Code P. G. L. 1903, art. 43, s. 90).

Offence—Penalty.—Any person to whom this sub-title applies practising, or attempting to practise, medicine or surgery in the State without such a license is guilty of a misdemeanor and punishable with a fine of from $50 to $200 for each offence, with confinement in jail, in default of payment, till fine and costs are paid, and shall be debarred from recovering compensation for services rendered as such physician or surgeon (*ib.*, s. 79).

Unlawfully obtaining and procuring the registration of one's self as physician or surgeon, by false and untrue statement contained in his application to the clerk of the court as required by this [sub-title],[1] or by presenting to said clerk a false or untrue license or one fraudulently obtained by false and fraudulent statements made to one of said boards, is a misdemeanor, punishable with a fine from $50 to $500 and forfeiture of all rights and immunities obtained or conferred upon him by such registration (Act 1894, c. 217, s. 1, 58; Poe's Code P. G. L. 1903, art. 43, s. 87).

After July 1st, 1894, practising or attempting to practise medicine or surgery without being registered in accordance with the provisions of this [sub-title][1] is a misdemeanor, punishable with a fine from $10 to $200 for each offence (Act 1894, c. 217, s. 1, 59; Poe's Code P. G. L. 1903, art. 43, s. 88).

[1] See p. 294, n. 1.

OFFENCE.—Practising or attempting to practise medicine under the name of any other person, whether that person be a resident of Maryland or not, or whether he or she be deceased or not, or acting under the name of and as agent of any other person, in the capacity of a practitioner of medicine or surgery, is a misdemeanor, punishable by imprisonment in jail from thirty days to one year, or by fine from $20 to $500, or both, for each offence (Act 1902, c. 612, s. 1, s. s. 64; Poe's Code Pub. Gen. Laws 1903, art. 43, s. 93).

REVOCATION.—Either board may by a vote of five members revoke any license which it has issued, and may cause the name of any physician licensed by said board to be removed from the register of licentiate of the city or county where it may be recorded, for the use of fraud or deception in passing the examination provided in this [sub-title], habitual drunkenness, criminal abortion, conviction of crime involving moral turpitude or unprofessional or dishonorable conduct. Before proceeding to revoke, the accused shall be furnished with a copy of the complaint and charges and shall be given an opportunity for a hearing before the board by person or by attorney, and testimony may be offered for and against the accused. The action of the board must be reduced to writing; within sixty days after notice of revocation there is a right of appeal to the circuit court of the city or county of his residence on the part of the accused, with right to a full hearing and determination by the judge or judges of all matters connected with the action of the board, and the decision of the court shall be final. If no such appeal be taken or the board's action be affirmed, the clerk of the circuit court or courts in which the revoked license shall have been recorded shall, on notice from the secretary-treasurer, strike the name of the accused from the list of licensed practitioners. Within two years from the revocation a new license may be issued without examination by vote of five members of the board which revoked. After two years a new license can only be obtained by compliance with the same requirements imposed on other applicants by this [sub-title] (Act 1902, c. 612, s. 1, s. s. 65; Poe's Code P. G. L. 1903, art. 43, s. 94).

FEES.—From medical students at end of second year of study under section 72 (Poe), the full regular fee at time of such examination, no part to be returned, but to be placed to their credit

for remainder of examination yet to be taken (Poe Code P. G. L. 1903, art. 43, s. 72).

Under section 73 (Poe), no fee (*ib.*, s. 73).

To secretary-treasurer, before examination, $20, which entitles to a second examination in case of failure, after six and within twelve months thereafter (*ib.*, s. 75).

To clerk of circuit court for registration, under section 78 (Poe), fifty cents (*ib.*, s. 78; Act 1904, c. 690).

To clerk for registration and registration of application or license therewith under section 86 (Poe), $1 (Poe, s. 86).

Massachusetts.

Board of Registration.—The governor, with the advice and consent of the council, appoints seven persons, residents of the commonwealth, graduates [1] of a legally chartered medical college or university having the power to confer degrees in medicine, and actively employed in the practice of their profession for ten years, to be a board of registration in medicine.[2] No member shall belong to the faculty of any medical college or university; no more than three members shall be at one time members of any one chartered state medical society (Rev. Laws

[1] A person who has received the honorary degree of doctor of medicine does not bring himself within a law which authorizes graduates to be entitled to all the rights granted to medical graduates of Harvard College. Wright *v.* Lauckton, 19 Pick, 288 (1837).

(The reporter of this case calls attention to the fact—1837—that the Revised Statutes of Massachusetts had repealed the statutes prohibiting unlicensed practitioners from recovering their fees.)

A vote by the authorities of a college empowered to confer degrees (where no method of exercising the power is prescribed by the law) is an execution of the power; no public annunciation or diploma is necessary. Wright *v.* Lauckton, 19 Pick, 288 (1837).

[2] It was said in Spaulding *v.* Inhab. of Alford, 1 Pick, 33 (1822) that it was no excuse for failure to comply with the earlier law for license by county societies, that there was no county society in the county where the physician studied or resided.

By passing the medical act of 1818, c. 113, requiring a license from the officers of the Massachusetts Medical Society or a graduate in medicine from Harvard University, the legislature did not intend to confer an exclusive privilege on any man or class of men, and did not violate the Bill of Rights; the sole purpose of the act was to guard the public against ignorance, negligence, and carelessness, and the means were adapted to that object. Hewitt *v.* Charier, 16 Pick, 353 (1835).

In Hewitt *v.* Charier, 16 Pick, 353 (1835) the court intimated that if the licensing of physicians had been committed to the officers of the Massachusetts Medical Society alone, it might have violated the provision of the Bill of Rights against granting particular and exclusive privileges.

1902, c. 76, s. 1). The board shall hold three regular meetings in each year, viz., second Tuesday of March, second Tuesday of July, and second Tuesday of November, and additional meetings at such times and places as it may determine (*ib.*, s. 2).

The board shall keep a record of the names of all persons registered hereunder, and a duplicate thereof shall always be open to inspection in the office of the secretary of the commonwealth (*ib.*, s. 6).

The board shall investigate all complaints of violation of secs. 1 to 9 inclusive, and report the same to the proper prosecuting officers (*ib.*, s. 6).

QUALIFICATION.—Applications for registration must be made on blanks furnished by the board, and must be signed and sworn to by the applicants (*ib.*, s. 3).

Each applicant for registration must furnish satisfactory proof of being twenty-one years of age, or over, and of good moral character, and on payment of $20 fee shall be examined by the board; and if found to be twenty-one years of age, or over, and of good moral character and qualified, by four or more members of the board, shall be registered as a qualified physician and shall receive a certificate thereof. A person who fails to pass an examination and is therefore refused registration is entitled to be re-examined at any meeting of the board called for examination of applicants within one year after such refusal without additional fee; two such re-examinations shall exhaust his privilege under his original application (*ib.*, s. 3).

REVOCATION.—The board may by a unanimous vote, after a hearing, revoke any certificate issued by it to, and cancel the registration of, any physician convicted of a felony or of any crime in the practice of his professional business (*ib.*, s. 3).

Examinations shall be wholly or partly in writing in the English language, and shall be of a scientific and practical character, and shall include the subjects of anatomy, surgery, physiology, pathology, obstetrics, gynecology, practice of medicine, and hygiene, and shall be sufficiently strict to test the applicant's fitness to practise medicine (*ib.*, s. 7).

PENALTY.—Whoever, not being lawfully authorized to practise medicine[1] within the Commonwealth and registered as afore-

[1] One who practises bone-setting is within the meaning of the statute (1818, c. 113) one who practises physic or surgery; it is not necessary for

said, holds himself out as a practitioner of medicine,[1] or practises or attempts to practise medicine in any of its branches,[1] or whoever practises medicine or surgery under a false or assumed name or under a name other than that by which he is registered, or whoever personates another practitioner of a like or different name shall, for each offence, be punished by a fine from $100 to $500, or by imprisonment for three months, or both (*ib.*, s. 8).

In a case in which a provision of this or the preceding section[2] has been violated, the person who committed the viola-

one to profess to practise generally either as a physician or surgeon; the statute extends to any one engaging in practice in a distinct department of either profession, and bone-setting and reducing sprains, swellings, and contractions of the sinews by friction and fomentation, but by no other department of the curing art, forms a considerable department in the practice of surgery. Hewitt *v.* Charier, 16 Pick, 353 (1835).

In Barrows *v.* Massachusetts Medical Society, 12 Cush, 402 (1853), it appears that one of the charges upon which the plaintiff was expelled from the defendant society was that he had adopted the homœopathic system. The court refused to grant a mandamus to compel his reinstatement.

[1] A person charged with holding himself out to the public as a physician and surgeon without being registered (under former law, St. 1894, c. 458, s. 10; St. 1895, c. 412), had a right to show that when selling drugs he told persons he was not a physician. If he sold the medicines and gave the advice gratuitously as to their use, he was not, in such instances, holding himself out as a physician. It was open to the State to contend that he was really acting as a physician and was paid for his services and made the statements to evade the statutory provisions; the question was for the jury. Commonwealth *v.* St. Pierre, 175 Mass., 48.

The burden was on defendant, if he relied on registration as justification, to prove that he was registered; this applies where absence of license is made part of the description of the offence. *Ib.*

Proof that he acted either as physician or surgeon (complaint under said former law) was sufficient to support complaint for holding himself out as physician *and* surgeon. There is but one offence, holding out as physician *or* surgeon; if the complaint charges both, the whole offence is proved if he is shown to have held himself out as either. *Ib.*

To hold himself out as an eye specialist was to hold himself out as a physician and surgeon. *Ib.*

Two early laws (1817, c. 131; 1818, c. 113) were *held* to apply to non-resident physicians as well as to residents, and it was held that non-resident physicians could not recover fees in the courts of Massachusetts for services rendered in Massachusetts unless licensed by the officers of the Massachusetts Medical Society or graduated a doctor in medicine in Harvard University. It was said that it could not be supposed that the legislature intended to deprive citizens of the State of privileges allowed to citizens of neighboring States, and that the objects of the law to guard against ignorant and unskilful practitioners could not be accomplished if physicians on the borders in neighboring States should be permitted to practise within its limits; that such a construction would leave citizens on the borders of the State exposed to the evils which the law was designed to prevent. Spaulding *v.* Inhab. of Alford, 1 Pick, 33 (1822).

[2] The preceding section (section 7) regulates the conduct of examinations; *query*, whether there can be, and if so, how, a *violation* of section 7?

tion shall not recover compensation for services rendered (*ib.*, s. 8).

Discrimination.—Sections 1 to 8 inclusive do not discriminate against any particular school or system of medicine (*ib.*, s. 9).

Exceptions.—The sections 1 to 8 do not prohibit medical or surgical service in a case of emergency, or the domestic administration of family remedies; they shall not apply to a commissioned officer of the United States army, navy, or marine hospital service in the performance of his official duty, nor to a physician or surgeon from another State, who is a legal practitioner in the State in which he resides, when in actual consultation with a legal practitioner of this Commonwealth; to a physician or surgeon residing in another State and legally qualified to practise therein whose general practice extends into the border towns of this Commonwealth, if he does not open an office or designate a place in such towns where he may meet patients or receive calls; nor to a physician authorized to practise medicine in another State, when he is called as the family physician to attend a person temporarily abiding in this Commonwealth; nor to registered pharmacists in prescribing gratuitously, osteopathists, pharmacists, nor to clairvoyants or persons practising hypnotism, magnetic healing, mind cure, massage, Christian science or cosmopathic method of healing, if they do not violate any of the provisions of section 8 (*ib.*, s. 9).

Fees.—With application for examination, $20. No additional fee for re-examination within one year, but two re-examinations exhaust the privilege (*ib.*, s. 3).

Michigan.[1]

(See Appendix, p. 691.)

Board of Registration in Medicine.—The governor appoints by and with the advice and consent of the Senate ten resident electors of the State, who constitute a board of registra-

[1] For list of previous acts in the State regulating practice of medicine, see People *v.* Reetz, 127 Mich., 87.

A former law (Act 1883, No. 167, as amended 1887, No. 268) was constitutional, both as respects its title and as an exercise of the police power; and was not unconstitutional as abridging the privileges and immunities of citizens of the United States, nor as depriving any person of property without due process of law, nor as denying to the citizens of any State the privileges and immunities of citizens in Michigan. People *v.* Phippin, 70 Mich., 6. (This case contains an extensive review of similar legislation and decisions in other States.)

On what is properly included

tion in medicine. Not more than five of the appointees shall be from the school of medicine known as regular, not more than two from the school known as homœopathic, not more than two from the school known as eclectic, and not more than one from the school known as physio-medical. The appointees may be chosen from the latest lists filed in the office of the Secretary of State by each of the four legally incorporated State medical societies of the said schools of medicine; in the absence of any such list, appointments to be made without reference thereto. The appointees shall be legally registered physicians of this State, graduates in good standing of reputable medical colleges, actively engaged in the practice of medicine in this State for at least six years immediately preceding their appointment. No member shall belong to the faculty of any medical college or university. The business of the board must be transacted by and receive the concurrent vote from at least seven members[1] (Act 1899, No. 237, s. 1, as amd. Act 1903, No. 191, s. 1). The board holds two regular meetings each year,[2] on the second

within a law whose title merely indicates that it deals with public health and does not specify in what respect, see dissenting opinion of Campbell, J., in People *v.* Phippin, 70 Mich., 6; see also this opinion for the history of medical legislation in Michigan from 1838, and its reasons, and the idea that legislation regulating practice checks substantial progress in the profession, as well as the idea that it is vicious in depriving citizens of a livelihood and of the free choice of medical advisers; and also the unjust effect of arbitrary time and space limits on men of professional ability, who cannot, through accident or chance or previous experience, comply with them, though fully competent according to all sound standards of actual professional skill; also the effect on those who are properly educated abroad, but under a system which does not satisfy the requirements of a law which the judge deems arbitrary. See also dissenting opinion of Morse, J., on the tendency of such legislation to build up an aristocracy, as bearing on its unconstitutionality, also on the monopolistic features of such laws when limiting the practice to college graduates.

The wisdom of such legislation is relegated to the people; the courts have nothing to do with it. People *v.* Moorman, 86 Mich., 433.

[1] The decision of People *v.* Phippin, 70 Mich., 6, determining the constitutionality of a former law, also settles the constitutionality of Act 1899, No. 237. People *v.* Reetz, 127 Mich., 87.

The law of 1899 is within the police power. Metcalfe *v.* State Board of Registration, 123 Mich., 661.

[2] The statute is not unconstitutional because it fails to make special provision for notice or hearing, or authority to summon witnesses or compel them to testify; when a statute fixes the time and place of the meeting of the board, no special notice to interested parties is necessary; the statute is sufficient notice. If applicant had applied at any meeting of the board for a hearing, they would have been compelled to grant it; and if on such hearing his offer or demand for testimony had been refused, the question might have been fairly presented to the State courts to what extent the action of the board had deprived him of his rights. Reetz *v.* Michigan, 188 U. S., 505.

Tuesday of October and the second Tuesday of June, and such additional meetings at such times and places as it may determine (*ib.*, s. 2).

QUALIFICATION.[1]—On and after[2] the passage of this act, all men and women who wish to begin the practice of medicine and surgery in any of its branches in this State shall make application to the board to be registered, and for a certificate of registration.[3] This registration and certificate shall be granted to such applicants[4] as give satisfactory proofs[5] of being twenty-one

[1] The regulation of the practice of medicine falls under the police power; it is not unconstitutional as an interference with the right of a citizen when ill to employ anybody he chooses as a physician. People *v.* Reetz, 127 Mich., 87; affd. 188 U. S., 505.

The decision of the highest court of a State that an act does not conflict with the State Constitution is conclusive; it cannot be reviewed on that ground by the Supreme Court of the United States; the State has power to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions. Reetz *v.* Michigan, 188 U. S., 505; citing Dent *v.* W. Va., 129 U. S., 114; Hawker *v.* N. Y., 170 U. S., 189.

There is no presumption of qualification (so held of one suing as a veterinary surgeon for services). Physicians who are graduates of medical colleges or are admitted to practise under the laws of the State will be presumed competent. Where no qualifications are prescribed by statute, those cases (*e.g.*, City of Chicago *v.* Wood, 24 Ill. App., 40; Williams *v.* People, 20 Ill. App., 92; 18 Am. and Eng. Enc. Law, 432) which say that in a civil action due qualification will be presumed, and in a criminal action the burden is on the defendant to show he had qualified, are not applicable (the Court seems to doubt the soundness of the distinction made in the above-cited cases between civil and criminal actions). Conkey *v.* Carpenter, 106 Mich., 1.

[2] A person once licensed to engage in practice has no *right* to continue such practice; a statute which requires a further license, and makes it a crime to practise without it, is not an *ex post facto* law. Reetz *v.* Michigan, 188 U. S., 505; citing Hawker *v.* N. Y., 170 U. S., 189, *infra*, p. 390.

There is no unconstitutional discrimination in providing that those who have practised continually for at least five years *in this State* shall be deemed qualified (citing *ex parte* Spinney, 10 Nev., 328), nor in excepting such persons from the requirement that all practitioners shall be graduates of a medical college; the legislature has this power. People *v.* Phippin, 70 Mich., 6.

A provision requiring the filing of a certificate within a short time after the passage of the act might be held void and the balance of the act upheld. People *v.* Phippin, 70 Mich., 6.

[3] There is no provision in the federal Constitution which forbids a State to grant to a board of registration the final determination of a legal question; due process of law is not necessarily judicial process; it is no objection to the law, under the federal Constitution, that it confers judicial powers on an administrative tribunal, and without appeal. Reetz *v.* Michigan, 188 U. S., 505.

[4] The proceedings before the board are not criminal in nature; the State there simply seeks to ascertain who ought to be permitted to practise; criminality only arises when one assumes to practise without having his right to do so established by the board. Reetz *v.* Michigan, 188 U. S., 505.

[5] A former act (1899, No. 237, s. 3, s. 1) provided for the registration of

years of age and of good moral character, but only on compliance with at least one of the following conditions contained in subdivisions 1, 2 and 3 of this section:[1]

1. On satisfactorily passing an examination before the board (see below "EXAMINATIONS").

2. If he present a certified copy or certificate of registration or license issued to applicant in any foreign nation where the requirements for registration shall be deemed by the board equivalent to those of this act, *provided* such country shall accord a like privilege to holders of certificates from this board.

3. If he present a certified copy of certificate of registration or license issued to applicant within the States, Territories, districts, or provinces of the United States where the requirements for registration shall be deemed by said board to be equivalent to those of this act, and shall otherwise conform to the rules and regulations agreed upon between the State board of which he is a licentiate and said board, relative to the recognition and exchange of certificates between States, *provided* such State shall accord a like privilege to holders of certificates from this board (*ib.*, s. 3 as amd. Act 1903, No. 191, s. 3).

OFFENCE—PENALTY.—Unlawfully obtaining and procuring one's self to be registered under this section (3), either by false and untrue statements contained in his application to the board, or by presenting to said board a false or untrue diploma or license, or one fraudulently obtained, is a felony, punishable with a fine

those who should present sufficient proof of having been already legally registered. An applicant produced proof that he was registered under a former law; nevertheless, the board rejected him, because the proof by which he secured registration under the former law showed that he had attended a medical college only one day, when he submitted to an examination and *graduated*. The Court held that the board was not bound by the mere fact of registration under the former law; it must have been a *legal* registration; that the former law defined legal registration and required the person registered to be a *graduate;* that the applicant was not a *graduate* within the meaning of the law, and was therefore not legally registered under the former law, and the Court denied his application for a mandamus to compel the board to register him under the new law. Metcalfe *v.* State Board of Registration, 123 Mich., 661.

[1] If the provisions for testing qualifications are reasonable in their nature, a person must comply with them and has no right to practise his profession in defiance of them. Reetz *v.* Michigan, 188 U. S., 505.

of $300 to $500, or imprisonment at hard labor one year to three years, or both, at the discretion of the court, and he shall forfeit all rights and privileges obtained or conferred upon him by virtue of such registration as a physician or surgeon (*ib.*).

Swearing falsely in any affidavit or oral testimony made or given by virtue of the provisions of this act, or the regulations of said board, is perjury, and subject to all the pains and penalties of perjury (*ib.*).

Refusal[1]—Revocation.—The board shall refuse to issue a certificate of registration provided for in section 3 to any person guilty of grossly unprofessional and dishonest conduct of a character likely to deceive the public; and shall, after due notice and hearing, revoke a certificate issued subsequent to June 4th, 1903, or subsequent to June 13th, 1899, for like cause or for offences involving moral turpitude, habitual intemperance, the drug habit, or for fraud or perjury in connection with obtaining a certificate of registration, or for a certificate obtained or issued through error, when such offences shall have been legally established in a court of competent jurisdiction; *provided* further, after June 4th, 1903, the board may at its discretion revoke the certificate of registration, after due notice and hearing, of any registered practitioner who inserts any advertisement in any newspaper, pamphet, circular, or other written or printed paper, relative to venereal diseases or other matter of any obscene or offensive nature derogatory to good morals (*ib.*).

Examinations, under subdivision 1 of section 3 above, are before the board on the following subjects: Anatomy, physiology, chemistry, pathology, materia medica and therapeutics, toxicology, histology, hygiene, practice of medicine, surgery, obstetrics, gynæcology, mental and nervous diseases, diseases of the eye, ear, nose and throat, bacteriology, public-health laws of Michigan, and medical jurisprudence, to be conducted as follows:

(*a*) A fee of $25, prior to the examination (a fee of $10 only for graduates of any medical school in the State of Michigan approved by the board).

(*b*) In writing, oral, or both.

[1] It is not true that the action of the board is not subject to judicial review (instancing Metcalfe *v.* State Board, 123 Mich., 661, as indicating that mandamus is the remedy). Reetz *v.* Michigan, 188 U. S., 505.

(*c*) Questions on all subjects except materia medica and therapeutics and practice of medicine to be such as may be answered alike by all schools of medicine.

(*d*) The applicant, if possible, to be examined in materia medica and therapeutics and practice of medicine by those members of the board or by a qualified examiner appointed by the board belonging to the same school as the applicant; no applicant shall be rejected because of his adherence to any particular system of practice.

(*e*) An average percentage of at least seventy-five per cent of correct answers shall be required from every candidate (*ib.*, s. 3, subd. 1, as amd. Act 1903, No. 191, s. 3).

No additional fee shall be charged by the board for registration of those who successfully pass such examination.

Provided, however, such applicant for examination have a diploma,[1] from a legally incorporated, regularly established, and reputable college of medicine within the States, Territories, districts, and provinces of the United States, or within any foreign nation (provided such foreign nation accord a like privilege to graduates of approved medical colleges of Michigan) having at least a four-years' course of seven months in each calendar year, as shall be approved and designated by the board of registration; also *provided* the applicant shall have previous to the beginning of his course in medicine a diploma from a recognized and reputable high school, academy, college, or university, having a classical course, or shall pass an examination equivalent at least to the minimum standard of preliminary education adopted and published by the said board, before examiners appointed by

[1] A law would be constitutional which prohibited all except medical graduates from practising. People *v.* Phippin, 70 Mich., 6.

On the constitutionality of laws confining practice to *college graduates* (and, by way of illustration, forbidding male physicians to attend females, and forbidding men with red hair to practise, or requiring all practitioners to be of noble birth, or of a certain blood or nationality, or to possess a certain amount of wealth, or granting to one class the exclusive right to sell bread or market potatoes), see dissenting opinion of Morse, J., in People *v.* Phippin, 70 Mich., 6.

"There can be no office, place of profit, honor or preferment, or business or profession open to a college graduate in this country, from which a man of equal learning, morality, skill, and experience can be debarred by law without serious hurt and damage to the public weal and without violation not only of the spirit, but the letter of our Constitution." Dissenting opinion of Morse, J., in People *v.* Phippin, 70 Mich., 6. See p. 363, n. 1.

and in accordance with the regulations of the board, and at such time and place as the board may designate. A student entering a college in Michigan, having a preliminary examination of a standard *approval (sic!)* by the said board, shall not be required to take this examination. The requirement of preliminary education shall not apply to those students who on the date of the passage of this act [June 4th, 1903] were regularly registered as students of legally organized and reputable medical colleges approved of by the said board. The requirements of medical education shall not apply to those graduates of legally organized and reputable medical colleges approved of by said board, who had graduated from such colleges, previous to the date of the passage of this act; and students complying with other provisions of this section, who on January 1st, 1903, were regularly registered as students of legally organized and reputable medical colleges of Michigan, approved of by said board, may obtain a certificate of registration as graduates of such colleges and without examination by the board on payment of $10 (*ib.*, s. 3, subd. First [*e*], as amd. Act 1903, No. 191, p. 3). (See Appendix, p. 692.)

Standard of Medical Education.—The said board shall from time to time adopt and publish a minimum standard of medical education, and no medical college shall be approved and designated by said board under this subdivision one of section 3, unless in the judgment of the board it conforms with such standard (*ib.*, s. 3, subd. First [*e*] as amd. Act 1903, No. 191, s. 3).

Filing.—The recipient of a certificate of registration shall file it or a certified copy with the county clerk in the county where he resides, and the clerk shall file the same and enter a proper memorandum in a book. The clerk shall on the first day of each month furnish to the secretary of the board a list of all certificates filed in his office the preceding month, and notice of the change of location or death of the grantee of a certificate, or on the revocation of a certificate the clerk shall enter at the appropriate places in the record a memorandum of said facts. In case of removal to another county, a person who has filed a certificate shall procure from said clerk a certified copy of said certificate and file the same with the clerk of the county to which he shall remove, who shall file and enter the same with like effect as the original (*ib.*, s. 4).

OFFENCE.[1]—Practising medicine or surgery in the State[2] without first complying with this act or violating its provisions (except as provided in sec. 3) is a misdemeanor (*ib.*, s. 7, as amd. Act 1903, No. 191, s. 7).[3] (See Appendix, p. 691.)

PENALTY.—Fine, not more than $100, or imprisonment in county jail not more than ninety days, or both, for each offence (*ib.*). (See Appendix, p. 691.)

PROSECUTION.—The prosecuting attorneys of the counties shall prosecute violations of the provisions of this act (*ib.*).

EXCEPTIONS.—The act does not apply to the commissioned surgeons of the United States army, navy, or marine hospital service, in actual performance of their official duties, nor to regularly licensed physicians or surgeons from out of this State in actual consultation with physicians of this State, nor to dentists in the legitimate practice of their profession, nor to temporary assistants in cases of emergency, nor to the domestic administration of family medicines, nor any legally qualified osteopath engaged in the practice of osteopathy under Act 1897, No. 78 (*ib.*, s. 8).

EVIDENCE.—When any person shall append the letters M.B. or M.D. or prefix the title "Dr." or Doctor or any other sign or appellation in a medical sense to his name, it shall be *prima facie*

[1] See p. 306, n. 1.

[2] In an action where negligence in the employment of a surgeon is in issue, proof that he was a physician and surgeon of eighteen years' practice and a graduate of the University of Michigan was *prima facie* proof of reasonable diligence and care in his selection. Reed *v.* City of Detroit, 108 Mich., 224. [It would seem, therefore, that proof that he was duly registered is not necessary, though that question was not discussed.]

The practice of dentistry is not the practice of medicine nor included in the idea of the practice of medicine (the Court intimates that it may be a branch of surgery, but expresses no opinion). People *v.* Phippin, 70 Mich., 6.

A practising physician, registered as such, has no right to dispense drugs without being registered as a pharmacist. People *v.* Moorman, 86 Mich., 433.

On the law limiting the right to vend proprietary medicines, as a monopoly, see People *v.* Moorman, 86 Mich., 433.

Though a practising physician must from the nature of his profession be competent to compound, put up, and sell drugs and medicines, nevertheless he has no vested right to do so, and in order to do so, out of his regular practice as a physician, he must become a registered pharmacist. People *v.* Moorman, 86 Mich., 433.

On what constituted "a practising physician" entitled to exemption from execution, on one horse, etc., in 1849, see Sutton *v.* Facey, 1 Mich., 243.

No person, however skilled, can in contemplation of law become a physician, so long as there is a prohibitory statute with which he has not complied. Sutton *v.* Facey, 1 Mich., 243.

[3] On form of complaint and mode of pleading offence, see People *v.* Phippin, 70 Mich., 6.

evidence of practising medicine and surgery within the meaning of this act (*ib.*, s. 9).[1]

Lists of Physicians.—The assessing officer at the time of making the annual assessment shall make out a list of physicians residing within his township, village, district, ward, or city, with the name, age, and sex of each, and the length of time each has been engaged in practice, and return the same to the county clerk, who shall record it and furnish certified lists to the secretary of the board (*ib.*, s. 10).

Fees.—Under subdivision 1 of section 3, as amd. 1903, prior to examination, $25; for graduates of any medical school in Michigan approved by the board, only $10. No additional fee for registration of those who successfully pass such examination. Graduates of colleges specified in subd. (*e*) of sec. 3, as amd. 1903 (above), as entitled to registration as such graduates, $10.

Under subdivision 2 of section 3, for registration, $25.

Under subdivision 3 of section 3, for registration, $25 (*ib.*, s. 3, as amd. Act, 1903, No. 191, sec. 3).

To county clerk for filing certificate and entering memorandum, 50 cents (*ib.*, s. 4). (See Appendix, p. 693.)

Medical Diplomas.—Excepting *licenses* (*sic!*) issued in accordance with law by the *State Board of Medical Examiners* (*sic!*) and diplomas issued by the University of Michigan, it shall be unlawful for any person or corporation, except a legally incorporated and reputable college of medicine and surgery having and requiring actual attendance at a course of study of not less than three years of eight months each, to issue a diploma or certificate setting forth or implying that the holder thereof is qualified to practise medicine or surgery in any of their branches (Act No. 151 of 1899, s. 1).

Offence.—Violation of last-mentioned section, misdemeanor (*ib.*).

Penalty.—For violation of said section, fine of from $100 to $500, or imprisonment in county jail not exceeding ninety days, or both, in discretion of the court (*ib.*).

[1] As evidence of holding out as practitioner of medicine, affidavit annexed to certificate of death, certificate of death, and report of infectious disease to board of health, in which accused signed himself "Medical Practitioner" and "Dr.," were admissible. People *v.* Phippin, 70 Mich., 6.

OSTEOPATHY—STATE BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION.—This board consists of five persons appointed by the governor with the advice and consent of the Senate; each appointee, before receiving his certificate of appointment must file with the governor a certificate of the Michigan State Osteopathic Association under the seal of its president and secretary that the person named is a graduate of a reputable school of osteopathy, has been engaged in the practice of osteopathy in Michigan for two years or more, is of good moral character and of good standing in his profession. The board meets at Lansing on the first Tuesday of September, each year, and at such other times as a majority may appoint. It must keep a record of its proceedings and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of osteopathy, the date of his diploma, and also whether the applicant was rejected or a certificate granted. (Act 1903, No. 162, s. 1.)

OSTEOPATHY—EVIDENCE.—The books and register of the board are *prima facie* evidence of all matters recorded therein (*ib.*).

OSTEOPATHY—QUALIFICATION.—Any person before practising osteopathy shall, on payment of $25, make application for a certificate to practise osteopathy to the Board of Osteopathic Registration and Examination, on a form prescribed by the board giving, first, his name, age, which shall not be less than twenty-one years, and residence; second, evidence that he shall have, before beginning his course in osteopathy, a diploma from a high school, academy, college, or university, approved by said board; third, the date of his diploma and evidence that such diploma was granted on personal attendance and completion of a course of study not less than three years of nine months each, and such other information as the board may require; fourth, the name of the school or college of osteopathy from which he was graduated, and which shall have been in good repute as such at the time of the issuing of his diploma, as determined by the board. The board may in its discretion accept as the equivalent of any part of (*sic!*) all of the second and third requirements, evidence of five or more years' reputable practice of osteopathy, by an osteopathic practitioner located in the State at the time of the passage of this act, provided such substitution be specified in the certificate.

Osteopathy—Examination—Certificate.—If the facts thus set forth, to which the applicant shall make affidavit, shall meet the requirements of the board, as laid down in its rules, the board shall require the applicant to submit to an examination as to his qualifications for the practice of osteopathy, which shall include the subjects of anatomy, physiology, physiological chemistry, toxicology, pathology, bacteriology, histology, neurology, physical diagnosis, obstetrics, gynecology, minor surgery, hygiene, medical jurisprudence, principles and practice of osteopathy, and such other subjects as the board may require. If the examination be passed, in a manner satisfactory to the board, the board shall issue its certificate, granting him the right to practise osteopathy, in Michigan. A person failing to pass may be reëxamined at any regular meeting of the board within a year without additional fee (*ib.*, s. 2).

Osteopathy—Former Practitioners.—The act provided for the issue of certificates without examination, on application made before January 1st, 1904, to those practising osteopathy in the State at the time of its passage, and holding a diploma from a regular college of osteopathy as determined by the board (*ib.*, s. 2).

This certificate, when filed with the county clerk of the county in which he resides, authorizes the holder to practise osteopathy in Michigan, but not to practise medicine within the meaning of Act No. 237, Public Acts 1899, or acts amendatory thereto (*ib.*, s. 2).

Osteopathy—Practitioners of Other States, etc.—The board may, in its discretion dispense with an examination of (*sic!*) the case, first, of an osteopathic practitioner duly authorized to practise osteopathy in any other State or Territory, or the District of Columbia, who presents a certificate or license issued after an examination by the legally constituted board of such State, Territory, or District of Columbia, accorded only to applicants of equal grade with those required in Michigan; or, second, an osteopathic practitioner who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to Michigan, and who makes application on a form prescribed by the board accompanied by a fee of $25 (*ib.*).

Osteopathy—Refusal of Certificate.—The board shall

refuse a certificate to any person guilty of grossly unprofessional and dishonest conduct (*ib.*).

Osteopathy—Certificate.—The certificate in section 2 entitles the holder to practise osteopathy in the State, but not to practise medicine and surgery within the meaning of Act No. 237, public acts 1899 or acts amendatory thereto; but nothing in the act prohibits any legalized osteopath in the State from practising medicine and surgery after having passed a satisfactory examination before the State Board of Medical Examiners in the State. Osteopathic practitioners shall observe and be subject to the State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and may have the right to certify births and deaths (*ib.*, s. 4).

Osteopathy—Recording.—Every person holding such certificate must have it recorded in the office of the county clerk of the county in which he expects to practise, and the date of recording shall be indicated thereon. Until the certificate is filed for record, the holder shall exercise none of the rights or privileges conferred therein.

The county clerk is required to keep a complete list of all certificates recorded by him, with the date of the recording of each certificate (*ib.*).

Osteopathy—Offence.—To practise or attempt to practise or use the science or system of ostcopathy in treating diseases of the human body or buying, selling, or fraudulently obtaining any diploma, license, record, or registration to practise osteopathy, or aiding or abetting in such selling or fraudulent obtaining; or practising osteopathy under cover of any diploma, license, record, or registration to practise osteopathy illegally obtained, or signed or issued unlawfully or under fraudulent representations; or after conviction of felony, practising osteopathy, or using any of the forms of letters, "osteopath," "osteopathist," osteopathy, osteopathic practitioner, doctor of osteopathy, diplomate in osteopathy, D.O., or any other titles or letters either alone or with qualifying words or phrases, under such circumstances as to induce the belief that the person who uses such terms is engaged in the practise of osteopathy, without compliance with the provisions of this act is a misdemeanor (*ib.*, s. 6).

OSTEOPATHY—PENALTY.—Fine $50 to $500, or imprisonment in county jail thirty days to one year, or both (*ib.*).

EXCEPTIONS.—Nothing in this act [*i.e.*, the act regulating osteopathy] shall be construed as prohibiting any lawfully qualified osteopathic practitioner in any other State or *county* (*sic!*) meeting a registered osteopathic practitioner in this State for consultation; or any osteopathic practitioner residing on the border of a neighboring State, and duly authorized under the laws thereof to practise, whose practice may extend into this State, and who does not open an office or appoint a place of meeting or receive calls in this State;[1] or any osteopathic practitioner duly registered in one county, called to attend isolated cases in another county (*ib.*, s. 6).

OSTEOPATHY—PROSECUTION.—It is the duty of the prosecuting attorneys of the counties to prosecute violations of the provisions of this act (*ib.*).

OSTEOPATHY—NOT THE PRACTICE OF MEDICINE—EXCEPTIONS.—The system of treating diseases of the human body known as osteopathy is not the practice of medicine or surgery within the meaning of Act No. 237, public acts 1899,[2] and not subject to the provisions of said act. This act shall not apply to any legally qualified medical practitioner, practising medicine and surgery under Act No. 237, public acts 1899, or acts amendatory thereto, nor shall this act apply to masseurs or nurses practising massage or manual Swedish movements in the State (*ib.*, s. 7).

OSTEOPATHY—FEES.—With application for certificate $25 (*ib.*, s. 2); no additional fee for reëxamination within one year from failure to pass examination (*ib.*). With application from practitioner of other State, etc., under section 2, $25 (*ib.*).

All fees to be paid in advance to the treasurer of the board (*ib.*, s. 3).

To county clerk for record of certificate $1 (*ib.*, s. 5).

MINNESOTA.[3]

STATE BOARD OF MEDICAL EXAMINERS.—The governor appoints a board of medical examiners of nine members, no one of

[1] The law does not specify what is not prohibited to these practitioners, but it is plainly inferable.

[2] See *supra*, p. 305 *et seq.*

[3] On the constitutionality of a similar law to regulate dentistry, and on the extent to which courts may go in determining what is *reasonable*, in a

whom can be a member of a college or university having a medical department, and three of whom must be homœopathic physicians (Gen. Stats., 1894, s. 7,891, as amended 1895, c. 89, s. 1). The board holds meetings for examination at the capital of the State on first Tuesday of January, April, June, and October of each year, and such other meetings as the board may appoint (Gen. Stats., 1894, s. 7,892, as amended 1895, c. 89, s. 2).

The board must keep a record or register of all applicants for a license, together with his or her age, time spent in the study of medicine, and the name and locations of all institutions granting to such applicants degrees or certificates of lectures in medicine or surgery. Said register shall show whether such applicant was rejected or licensed, and shall be *prima facie* evidence of all of the matters therein recorded (*ib.*).

QUALIFICATION.[1]—It is unlawful[2] for any person to practise medicine[3] without a license from said board[4] or without having filed with the secretary of the board an affidavit setting forth the times and places in which he or she has practised medicine within this State prior to the passage of this law[5] (Act 1887, c. 9, s. 3; Gen. Stats., 1894, s. 7,893, as amended Act 1895, c. 89, s. 3). Persons in continuous practice in this State since June 1st, 1887, not licensed under c. 125, General Laws 1883, may become li-

provision of such a law, see State *v.* Vandersluis, 42 Minn., 129.

[1] Any person has the right to pursue any lawful calling, but in respect to certain occupations not in themselves unlawful this right is necessarily subject to legislative restrictions from considerations of public policy State *v.* State Medical Board, 32 Minn., 324.

[2] The power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession of medicine those who are unfitted to discharge its duties cannot be doubted. State *v.* State Medical Board, 32 Minn., 324.

[3] One practising medicine practises "the art of preventing, curing, or alleviating diseases, and remedying as far as possible, the results of violence and accident." Therapy is the treatment of disease, and surgery is therapy of a distinctly operative kind. Stewart *v.* Raab, 55 Minn., 20.

[4] The vocation of physician is lawful; the right of any person to engage in it is only subject to such restrictions as the legislature may impose in the exercise of its general police power. State *v.* State Medical Board, 32 Minn, 324.

The duty of determining the qualifications may be committed to the legally constituted body of men, learned in the profession, named in this act (Act 1883, c. 125, which named the faculty of the medical department of the University of Minnesota, as a board of medical examiners). State *v.* State Medical Board, 32 Minn., 324.

[5] On reason for discriminating between the qualification arising from ten years' practice previous to the passage of the law, and ten years' practice subsequent to its passage, see State *v.* Vandersluis, 42 Minn., 129 (under law regulating dentistry).

See p. 270, n. 3.

censed practitioners by submitting to the said board a diploma[1] from a recognized college of medicine or by undergoing an individual examination at a regular examination prescribed by the act now in force (*ib.*). Persons hereafter commencing the practice of medicine and surgery in any of its branches must apply to the board for a license, and at the time and place designated by the board, or at a regular meeting, submit to an examination in anatomy, physiology, chemistry, histology, materia medica, therapeutics, preventive medicine, practice of medicine, surgery, obstetrics, diseases of women and children, of the nervous system, of the eye and ear, medical jurisprudence, and such other branches as the board deems advisable, and present evidence of having attended three full courses of lectures at a medical college recognized by the said board, of at least twenty-six weeks each, no two courses being within the same year. After January 1st, 1899, it shall be necessary for all persons commencing the practice of medicine and surgery to submit to an examination in the above-mentioned branches and present evidence of having attended four full courses[2] of lectures at such medical college, of at least twenty-six weeks each, no two courses being in the same year[1] (Act 1887, c. 9, s. 3; Gen. Stats., 1894, s. 7,893, as amended 1895, c. 89, s. 3).

Examinations.—All examination papers on subjects requiring treatment peculiar to any school of medicine shall be examined and their sufficiency passed upon by the members of said board belonging to such school, if such there be, and their recommendation as to the proficiency of such candidate in those particular subjects shall be deemed final by said board (*ib.*). The examination must be both scientific and practical, but of sufficient severity to test the candidate's fitness to practise medicine and surgery. When desired, the examination may be conducted in the presence of the dean of any medical school or the president of any medical society of this State (*ib.*).

License.—After examination, the board must grant,[3] with

[1] That an act is constitutional which requires a person to be a graduate, see State *v.* Vandersluis, 42 Minn., 129, citing Hewitt *v.* Charier, 16 Pick (Mass.), 353.

[2] On definition of "regular, uninterrupted course," as not excluding vacations, see State *v.* Vandersluis, 42 Minn., 129.

[3] The action of the Board is not merely ministerial, but partakes of a judicial character (cf., however, note

the consent of at least seven members,[1] a license to practise medicine and surgery, which may be refused[2] or revoked[3] for unprofessional,[4] dishonorable,[5] or immoral conduct[6]; and in case

[3], 34 Minn., 387). The refusal of the board to issue a certificate, where it has not refused or neglected to pass on the matter submitted to it, cannot be reviewed by mandamus. State *v.* State Board, 32 Minn., 324.

[1] The Act (so held of 1883, c. 125; 1887, c. 9) is not unconstitutional because of any arbitrary power conferred on the board; the requirement that seven members should consent, did not give them the right and power to disregard the learning and qualifications of the applicant, nor unreasonably and arbitrarily to reject his claims, nor at will to grant or refuse the certificate. The requirement that seven members must concur is merely a regulation of the mode in which a determination must be reached. State *v.* Fleischer, 41 Minn., 69.

[2] While the right to practise is a qualified one, it is not to be arbitrarily and without reason denied. State *v.* State Medical Board, 32 Minn., 324.

An adverse determination of the examining board does not deprive an applicant of his property without due process of law. State *v.* State Medical Board, 32 Minn., 324.

[3] In State *v.* State Board, 34 Minn., 387, the court assumed without argument, that the act (1883, c. 125, s. 9) gave the board power to revoke certificates issued to graduates of medicine who have diplomas as well as those issued to non-graduates who were examined by the board as to their qualifications.

This case was cited in Hawker *v.* New York, 170 U. S. at 200 to sustain the proposition that the legislature, after a license, may exact and require additional qualifications as the condition of further practice.

Due process of law, or the law of the land, is not necessarily judicial proceedings. State *v.* State Board, 34 Minn., 387.

The revocation of a license is an exercise of the police power; the same body, which may be vested with the power to grant may be vested with the power to revoke; this act (1883, c. 125, s. 9, containing substantially similar provisions as to revocation) is constitutional; and a writ of prohibition based on its unconstitutionality will be quashed. *Quære*, whether the proceedings are even *quasi*-judicial, and therefore whether a writ of prohibition would lie. State *v.* State Board, 34 Minn., 387.

[4] By "unprofessional conduct" the legislature did not contemplate matters of merely professional ethics. The term unprofessional was used convertibly with "dishonorable." State *v.* State Medical Board, 32 Minn., 324.

It might be deemed unprofessional for members of one school of medical practice to consult professionally with a member of a different school; but such matters are not within the plain purpose of the act, which was the affording of protection to the people against ignorant, unqualified, and unworthy practitioners of the profession. State *v.* State Medical Board, 32 Minn., 324.

[5] The legislature has the power to require that the practitioner shall be possessed of honor and good moral character. State *v.* State Medical Board, 32 Minn., 324, cited with approval in Hawker *v.* New York, 170 U. S. at 194.

In the exercise of its general police power the legislature has authority to make such reasonable requirements as may be calculated to bar from admission to the profession dishonorable men whose principles or practices are such as to render them unfit to be entrusted with the discharge of its duties. State *v.* State Medical Board, 32 Minn., 324.

[6] The means properly adopted by the legislature to determine professional or intellectual fitness cannot be said to be unconstitutional when prescribed for the determination of moral fitness. State *v.* State Medical Board, 32 Minn., 324.

of refusal[1] or revocation, the applicant may appeal to the governor (*ib.*).

Filing.—The license or a certified copy must be filed with the clerk of the district court in the county in which the licensee resides, and the clerk shall file the same and enter a memorandum thereof, giving date of said license, name of licensee, and date of filing, and shall furnish each year to the secretary of the board a list of all certificates on file in his office; and on notice to him of the change of location or death of a licensee or of the revocation of the license, the clerk shall enter at the appropriate places in the record a memorandum of said fact. If the licensee moves into another county he must procure a certified copy of his license from the said clerk and file it with the clerk of the district court in the latter county, who shall file and enter the same with like effect as if it were the original (Act 1887, c. 9, s. 4; Gen. Stats., 1894, s. 7,894).

Offence—Penalty.—To practise medicine[2, 3] or surgery[4] without a license or contrary to the act is a misdemeanor, punishable by a fine of from $50 to $100, or imprisonment in county jail from ten to ninety days, or both.

Definition.—Appending "M.D." or "M.B." to name, or for a fee prescribing, directing, or recommending for use of any person any drug or medicine or other agency for the treatment, care, or relief of any wound, fracture, or bodily injury, infirmity, or disease, is regarded as practising medicine[3] (Act 1887, c. 9, s. 6; Gen. Stats., 1894, s. 7,896).

Exceptions.—The act is not applicable to dentists[2, 4] (Act 1887, c. 9, s. 6; Gen. Stats., 1894, s. 7,896), nor to commissioned surgeons of the United States army or navy, nor to physicians or surgeons in actual consultation from other States or Territories, nor to actual medical students practising medicine under

[1] It is so opposed to the principles of the common law that any fact affecting the rights of an individual shall be investigated and determined *ex parte*, and without opportunity of the party affected to be heard, that the act (a former Act of 1883, c. 125) should not be construed as contemplating such a proceeding, unless that purpose is expressed in the plainest terms. State *v.* State Medical Board, 32 Minn., 324.

[2] That dentistry is a branch of medicine, see dictum in State *v.* Vandersluis, 42 Minn., 219, at p. 135.

[3] See p. 317, n. 3.

[4] That a licensed surgeon is permitted by his license to do acts coming within his profession, which also lie within the domain of another licensed profession (*e.g.*, dentistry), see State *v.* Vandersluis, 42 Minn., 129.

the direct supervision of a preceptor (Act 1887, c. 9, s. 5; Gen. Stats., 1894, s. 7,895).

All persons licensed under the Act of 1883, c. 125, are regarded as licensed under this act, and the secretary of the board is required to enter the names of such persons on the register kept by him, as licensed physicians and surgeons, without application or fee (Act 1887, c. 9, s. 7; Gen. Stats., 1894, s. 7,897).[1]

Jurisdiction.—Justices of the peace and the respective municipal courts have jurisdiction over violations of this act (Act 1887, c. 9, s. 6; Gen. Stats., 1894, s. 7,896).[2]

Prosecutions.—The respective county attorneys shall prosecute violations (*ib.*).

Physicians from Other States.—The board, with or without examination, may grant a license to any physician licensed to practise by a similar board of another State, and who holds a certificate of registration showing that an examination has been made by the proper board of any State in which an average grade of not less than seventy-five per cent was awarded the holder thereof, the applicant and holder having been at the time of such examination the legal possessor of a diploma from a medical college in good standing in this State, which diploma may be accepted in lieu of an examination as evidence of qualification. In case the scope of said examination was less than that prescribed by this State, the applicant may be required to submit to an examination in such subjects as have not been covered Act 1905, c. 236, s. 1).

A certificate of registration or license issued by the proper board of any State may be accepted as evidence of qualification for registration in this State, provided the holder was at the time of such registration the legal possessor of a diploma issued by a medical college in good standing in this State, and that the date thereof was prior to the legal requirements of the examination test in this State (*ib.*).

If by the laws of any State or the rulings or decisions of the appropriate officers on (*sic!*) boards thereof, any burden, obli-

[1] On the constitutionality of the Act of 1883, c. 125, see notes above on the cases in 32 Minn., 34 Minn., and 41 Minn. A license under the Act of 1883, entitled the licensee to practise medicine in all its branches including surgery. Stewart *v.* Raab, 55 Minn., 20.

[2] Evidence. — Evidence, without objection that a person was a *veterinary* surgeon, implies, *prima facie*, that he was licensed as such. Lyford *v.* Martin, 79 Minn., 243.

gation, requirement, disqualification, or disability is put upon physicians registered in this State or holding diplomas from medical colleges in this State which are in good standing therein, affecting the right of said physicians to be registered or admitted to practise in said State, then the same or like burdens, obligations, requirements, disqualifications, or disability shall be put upon the registration in this State of physicians registered in said State or holding diplomas from medical colleges situated therein (*ib.*, s. 2).

FEES.—For license of person in continuous practice since June 1st, 1887, under section 3, $10 (Act 1887, c. 9, s. 3, as amended Act 1895, c. 89, s. 3).

For examination to cover subjects not covered by scope of previous examination in sec. 1 of c. 236, Laws 1905, $50 (Laws 1905, c. 236, s. 1).

To treasurer of board, for examination, $10 (*ib.*).

MIDWIFERY.—Every person practising midwifery in any of its branches shall possess the qualifications required by this act. Every person hereafter beginning the practice of midwifery in this State, if a graduate in midwifery, shall present his or her diploma to the State medical examining board for verification of its genuineness; if found to be genuine, and the person named therein be the person claiming and presenting the same, the board on payment of the fee shall issue a license to that effect, which shall be conclusive as to the right of the person named therein to practise midwifery in the State for one year; if not a graduate, such person shall appear before the board and submit to such examination in midwifery as the board shall require, and if satisfactory to the examiners the board shall issue its license, on payment of the fee, and the person named shall be entitled to all the privileges and rights hereinafter mentioned for one year (Act 1891, c. 30, s. 1; Gen. Stats., 1894, s. 7,898).

FORMER PRACTITIONERS OF MIDWIFERY.—Persons heretofore practising midwifery in any of its branches in the State shall register their names with the secretary of the State medical examining board, with an affidavit duly executed before a notary public, or with a written certificate from some legally authorized practitioner of medicine, setting forth the time and places in which such person has been engaged in the practice of midwifery in the State; and on filing such certificate and payment of the

fee the board shall issue a license which shall entitle the person named therein to all rights and privileges hereinafter mentioned for the period of one year (Act 1891, c. 30, s. 2; Gen. Stats., 1894, s. 7,899).

Annual Registration of Midwives.—Every person so licensed (*i.e.*, to practise midwifery) shall each year subsequently register his or her name with the secretary of said board, and pay to the secretary $1, and he shall issue a license in accordance therewith (Act 1891, c. 30, s. 3; Gen. Stats., 1894, s. 7,900).

Examinations for Midwives.—The State board of medical examiners is authorized to execute the provisions of this act, and shall hold examinations of candidates for licenses in midwifery, at the capital, on the first Tuesday of January, April, July, and October, and at such other times and places as may be deemed expedient (Act 1891, c. 30, s. 4; Gen. Stats., 1894, s. 7,901).

Refusal—Revocation of Midwives' Licenses.—The said board may refuse licenses to persons guilty of unprofessional or dishonorable conduct, and may revoke licenses for like causes or for neglect to make proper returns to various health officers of births, deaths, and of cases of puerperal fever and other contagious disease occurring in their practice (Act 1891, c. 30, s. 5; Gen. Stats., 1894, s. 7,902).

Definition—Midwifery.—A person shall be regarded as practising midwifery who shall publicly profess to be a midwife, or who shall for a fee attend to women in childbirth; but nothing in this act shall be construed to prohibit students of medicine or midwifery practising under the direct supervision of a preceptor or to prohibit gratuitous services in cases of emergency (Act 1891, c. 30, s. 6; Gen. Stats., 1894, s. 7,903).

Exceptions—Midwifery.—This act shall not apply to physicians and surgeons duly authorized by the State board of medical examiners or to commissioned surgeons of the United States army or navy (*ib.*).

Penalty—Midwifery.—Practising midwifery without compliance with this act, fine $10 to $50 or imprisonment in county jail ten to thirty days (Act 1891, c. 30, s. 7; Gen. Stats., 1894, s. 7,904).

Fees—Midwifery.—For license without examination under section 7,898, $1.

For license after examination under section 7,898, $2.

For license under section 7,899, $1.

For annual registration under section 7,900, $1.

MIDWIFERY—LYING-IN—LOCAL PERMIT.—No person shall engage in the business of receiving into their premises, for pay, more than one person in six months, to be cared for during childbirth, without first obtaining permit from the health officer of the city, village, or town; or if there be none, from the county physician of the district in which they reside, and filing it in the office of the clerk of the city, village, or town. Such permits shall contain the certificate of such officer that he has personal knowledge of the applicant, that she is duly licensed to practise midwifery by the State Medical Board of Minnesota, and that she is of good moral character; and shall also describe the premises into which such persons may be received, and also how many persons may be so received at one time, and no such permit shall be issued unless the premises and furnishings are in fit sanitary condition. Such permit shall not be issued for longer than one year and only one permit may be issued for any certain premises. Such officer shall be entitled to $2 for making the necessary inspection and issuing such permit (Act 1901, c. 106, s. 1). Failure to comply with any of the provisions of this act is a misdemeanor (*ib.*, s. 6).[1]

OSTEOPATHY, BOARD OF OSTEOPATHIC EXAMINERS, AND REGISTRATION.—Consists of five members, resident osteopathic physicians of good standing in their profession and graduates of legally chartered schools of osteopathy in good standing as such. No member shall be a member of the faculty of or financially interested in any osteopathic school. Its president and secretary shall have power to administer oaths. The board meets on the second Tuesday of March and September and at such other times and such places within the State as a majority of the board shall deem necessary and convenient. Three members constitute a quorum. The secretary keeps a record of its proceedings and a register of applicants for licenses, giving the name and location of the institution granting the applicant the degree of or diplomat in osteopathy or his certificate of attendance, the date of

[1] This act contains several other provisions, regarding inspection of the premises, baby-farming, and other kindred subjects and regulations, not within the scope of this article.

his diploma, and also showing whether the applicant was rejected or a license granted. The book and register of the board shall be *prima facie* evidence of all matters recorded therein (Act 1903, c. 369, s. 1).

Osteopathy—Qualification.—The act made provision for the license upon application within sixty days from its passage (April 21st, 1903), of any person engaged in the practice of osteopathy in Minnesota prior to March 1st, 1903, who should exhibit a diploma issued by a legally incorporated and regularly conducted school of osteopathy, who should pass an examination in anatomy, physiology, urinalysis, *symptomology* (*sic!*), pathology, gynecology, obstetrics, chemistry, toxicology, minor surgery, hygiene, dietetics, diagnosis, and theory and practice of osteopathy, and who should make affidavit that he was the person to whom the diploma was issued, and was engaged in the practice of osteopathy in the State prior to March 1st, 1903. If such diploma or examination should be satisfactory to a majority of the board, the board was required to issue its license granting him the right to practise osteopathy in the State (*ib.*, s. 2).

Any person desiring to commence the practice of osteopathy in the State after March 1st, 1903, must make written application to the secretary of the board for a license and appear at the first regular meeting thereafter; and shall furnish evidence of having attended not less than four full courses of five months each at a legally incorporated school or college of osteopathy recognized by the board, and wherein the curriculum of study shall include instruction in anatomy, histology, physiology, pathology, gynecology, obstetrics, chemistry, including urinalysis and toxicology, symptomatology, minor surgery, hygiene, dietetics, diagnosis and theory and practice of osteopathy, and upon passing an examination in these studies satisfactory to a majority of the board, shall be granted a license to practise osteopathy in this State. Holders of diplomas or certificates issued after September 1st, 1905, must furnish evidence of having attended not less than three full courses of eight months each, no two of which shall be given in any one year. Such examination may be waived as to any person or persons who have duly graduated from and hold the diploma from any legally incorporated school or college of osteopathy recognized by the board, having the curriculum of study herein specified and who have duly practised

their profession in some other State or Territory for not less than two years preceding the date of their application (*ib.*, s. 3).

OSTEOPATHY—REFUSAL—REVOCATION.—The board may refuse to grant a license to any person guilty of unprofessional or dishonorable conduct or guilty of a felony, or addicted to the liquor or drug habit to such a degree as to render him unfit to practise, and may, after notice and hearing (at which the person shall be entitled to appear personally or by attorney and offer evidence), revoke for such cause a license theretofore granted. "Unprofessional or dishonorable conduct" mean (1) procuring or aiding or abetting in procuring a criminal abortion; (2) obtaining any fee by representing that a manifestly incurable disease can be permanently cured by them; (3) conviction of any offense involving moral turpitude; (4) wilful betrayal of professional confidence or secrets to the detriment of a patient (*ib.*, s. 4).

OSTEOPATHY—GENERAL PROVISIONS.—The license under this act does not authorize the holder to give or prescribe drugs for internal use nor to perform major surgery. Osteopathic physicians are subject to the same rules and regulations, municipal and State, that govern other physicians in the control of contagious diseases and shall be entitled to all privileges of other physicians in matters pertaining to public health (*ib.*, s. 5).

OSTEOPATHY—RECORDING.—Every holder of a license from said board shall have it recorded in the office of the clerk of the district court in the county in which he or she expects to practise and the date of recording shall be indicated therein. Until it is filed for record, the holder shall exercise none of the rights or privileges conferred therein. The clerk shall keep in a book a complete list of the licenses recorded with date of record.

OSTEOPATHY—OFFENCE—PENALTY.—Practising or attempting osteopathy in treating diseases or any ailment whatsoever of the human body, or using the terms or letters, Osteopath, Osteopathist, Osteopathy, Doctor of Osteopathy, Diplomat in Osteopathy, or D.O.; or any other titles or letters under such circumstances as to induce the belief that the person who uses such terms is engaged in the practice of osteopathy, without having complied with the provisions of this act, is a misdemeanor punishable with a fine from $50 to $100, or imprisonment in the county jail from thirty days to six months or both, in the discretion of the court.

OSTEOPATHY—PROSECUTION.—If the board or a member have knowledge or notice that the act is being violated, it or he shall investigate, and upon probable cause appearing shall file a complaint and institute prosecution against the offender; and the county attorney of the county in which such person resides or practises shall, when requested by the board or member, or otherwise notified of such violation, take charge of and conduct the prosecution under this act.

Nothing in this act shall be construed as prohibiting, infringing upon, or in any manner interfering with any other school, art, system or science of healing in this State from the practice of their profession as provided by the laws of Minnesota (*ib.*, s. 6).

All acts and parts of acts in conflict with this act are repealed (*ib.*, s. 7).

OSTEOPATHY, NOT MEDICINE OR SURGERY.—The science of treating diseases known as osteopathy is not the practice of medicine or surgery, within the meaning of existing medical laws of the State (*ib.*, s. 8).

OSTEOPATHY—FEES.—To accompany application for license, $20, not to be returned in event of failure to pass, but applicant may within one year after such failure present himself and again be examined without the payment of an additional fee (*ib.*, s. 4). To clerk of district court for making record of license, $1 (*ib.*, s. 6).

MISSISSIPPI.

QUALIFICATION.—A practitioner of medicine[1] must obtain

[1] OSTEOPATHY.—Definitions of osteopathy as given by Dr. A. F. Still, of Kirksville, Mo., the originator of the science, or art, or school, of osteopathy, and by the *Boston Osteopath*, and by the *Osteopathic Physician*, of Chicago, and by the *Journal of Osteopathy*, are collated in the brief of Monroe McClurg, Esq., attorney-general of Mississippi, in Hayden *v.* State, 81 Miss., 291.

The treatment of his patient by an osteopath, which consists solely of scientific manipulation of the limbs, muscles, ligaments, and bones, which were pressing on the nerves of the blood supply, and in which no drug or medicine was used, was not an appliance or agency within the meaning of the statutory definition of *practising medicine;* and the osteopath was not practising medicine; and the medical act of Mississippi was not intended to regulate the practice of osteopathy. Hayden *v.* State, 81 Miss., 291, citing: State *v.* Leffring, 61 Ohio St., 39, 55 N. E. R., 168, 46 L. R. A., 334, 76 Am. St. R., 358; State of Rhode Island *v.* Mylod, 40 Atl., 753, 41 L. R. A., 428; Nelson *v.* Board (Ky.), 57 S. W. R., 501, 50 L. R. A., 383; and distinguishing Bragg *v.* State (Ala.), 32 South. R., 767.

A future legislature will doubtless make suitable regulations for the

a license from the State board of health (Code 1892, s. 3,243).[1]

Application is made in writing; and an examination is made in anatomy, chemistry, obstetrics, materia medica, physiology, pathology, surgery, and hygiene, and if the applicant is found by the board to possess sufficient learning in those branches, and of good moral character, the board issues a license to practise medicine, signed by each member who approves (*ib.*, s. 3,244).

The application must state the applicant's full name, place of residence, and post-office address, nativity and age, time spent in medical studies, name and post-office address of the preceptor under whom his medical studies were pursued, the courses of medical lectures attended, the name of medical schools attended; if a graduate of a medical college, the name thereof; the time spent in a hospital, the time spent in the practice of medicine, if any, the school or system of practice chosen, and references as to his personal character (*ib.*, s. 3,245).

Examinations are to be conducted at the capitol twice in each year, at such time as may be designated by the board, and continue until all applicants are examined and the examinations are approved or disapproved; they are upon written questions and answers, and no distinction can be made between applicants because of different systems or schools of practice that may be chosen (*ib.*, s. 3,246, as amended 1898, c. 79, s. 1).

The license must be filed in the office of the clerk of the circuit court of the county in which the licensee resides, within sixty days from the date of its issue; otherwise it becomes void. The clerk must record the same with his certificate of filing and deliver the original to the licensee. When the licensee changes the county of his residence and usual practice, he must file the original or a certified copy of license, or record, in the office of said clerk in the county into which he shall move and practise

practice of osteopathy so as to exclude ignorant and unskilful practitioners of the art, but the world needs and may demand that nothing good or wholesome shall be denied from its use and enjoyment (*ob. dic.*, in Hayden *v.* State).

[1] A practising physician, who had practised for six years, but was not a graduate of any medical college or institution, and who had no license to practise medicine, but who had attended one course of medical lectures, and had studied the science three years before commencing practice, was held competent as an expert medical witness in New Orleans, Jackson & Great Northern Railroad Co. *v.* Allbritton, 9 George, 242 (1859).

within sixty days of the time of his removal, to be there recorded (*ib.*, s. 3,249).

The board may issue a new license in its discretion if a license be lost, or if the holder fail to have it recorded within sixty days as required by law (*ib.*, s. 3,250, as amended Act 1898, c. 76, s. 1).

The secretary of the board may issue a temporary license which shall be valid until the next succeeding meeting of the board, such license to show its date of issue, otherwise to be void; it must be recorded as a permanent license is required to be; only one temporary license shall ever be issued to the same person, and it shall always be made to an individual and not to a partnership (*ib.*, s. 3,251).

Physicians practising by virtue of a license under prior laws are not required to obtain a license under this law and may continue in practice under their licenses, but they must comply with the requirements of this law with reference to recording (*ib.*, s. 3,252).

DEFINITION.[1]—The practice of medicine shall mean to suggest, recommend, prescribe or direct for the use of any person, any drug, medicine, appliance or other agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture, or other bodily injury or deformity, or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation; but this does not apply to females engaged solely in the practice of midwifery (Act 1896, c. 68, s. 1).

PENALTY.—To practise without an examination and a license is punishable with a fine of from $20 to $200, or by imprisonment in the county jail not to exceed thirty days (Code 1892, s. 1,258).[2]

[1] See n. 1, p. 328.

[2] Where the doing of an act is prohibited by legislative authority under a penalty, it cannot constitute a consideration to support a contract; an exception to this rule is where the penalty is imposed for revenue, and not to prohibit the act or avoid the contract. A physician, who had graduated in medicine and who was skilful in medicine who had procured a temporary license, which had expired when he performed services for which he sought to recover, and who was disabled by sickness from attending before the board for a permanent license, was nevertheless not entitled to recover for services rendered after the expiration of his temporary license, and when he had no license. It is for the legislature, and not for the court, to engraft upon the law wise exceptions, such as provision for the extension of temporary licenses in such cases. Bohn *v.* Lowery, 77 Miss., 424. See p. 334, n. 4

EXCEPTIONS.—Females engaged in the practice of midwifery need no license for that employment (*ib.*, s. 3,253).

NON-RESIDENTS.—Licensed physicians residing without the State, and whose practice extends into it, may obtain a license without examination by presenting an application in the form prescribed; whereupon the secretary of the board must issue a license in the name of the board and the license must be recorded as hereinbefore provided, in each county in which the licensee shall practise (*ib.*, s. 3,254).

PRIVILEGE TAXES.—For sale of patent medicines (except by merchant or druggist selling from his place of business) $150 per annum, expiring April 30th annually. For each transient vendor or trader of patent, secret or proprietary medicines or nostrums, by whatever name called, whether traded or sold by another or otherwise, in each county $500 per annum, expiring April 30th annually. The license is a personal privilege not transferable. If a person fails to obtain license in the month when it is due he is liable in double the amount of the tax (Act 1904, c. 76, ss. 66, 109, 112).

FEES.—To board, before examination, $10.

To secretary, before examination, 25 cents (Code 1892, s. 3,247).

To secretary, for temporary license, 25 cents (*ib.*, s. 3,251).

To secretary, for license to non-resident, 25 cents (*ib.*, s. 3,245.)

To the clerk of the court, for recording, his legal fees (*ib.*, s. 3,249).

DEPARTMENT OF HEALTH.—Any licensed practitioner of medicine in the State, who is a graduate of an approved institution of medicine, may on application have his name enrolled as a member of the Mississippi department of public health (Act 1897, c. 15, s. 1).

MISSOURI.

QUALIFICATION.—It is unlawful for any person not now a registered physician within the meaning of the law (March 12, 1901) to practise medicine or surgery in any of its departments or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in Missouri except as provided in this act (Act 1901, p. 207, s. 1).

STATE BOARD OF HEALTH.[1]—The State board of health has general supervision over the registration of all practitioners of medicine,[2] surgery, and midwifery in the State (*ib.*, s. 2).

QUALIFICATION.[3]—All persons desiring to practise medicine or surgery,[4] or to treat the sick or afflicted[5] as provided in section 1, must appear before the State board of health at such time and place as the board may direct, and there be examined[6] as to their fitness to engage in such practice.[7] Application for examination must be made in writing to the secretary of the board at least thirty days before the meeting. Applicants must furnish satisfactory evidence of their preliminary qualifications and of good moral character (*ib.*, s. 3).

EXAMINATION.—The medical examination may be wholly or

[1] The creation of the board with the powers specified is within the constitutional power of the legislature (so held of former Act of 1883). State *ex rel.* Granville *v.* Gregory, 83 Mo., 123.

[2] For definition of *family physician*, see Reid *v.* Piedmont & Arlington Life Ins. Co., 58 Mo., 421.

[3] The objects of such legislation are explained in State *ex rel.* Granville *v.* Gregory, 83 Mo., 123.

[4] The words "medicine and surgery" and "practising medicine and surgery" in a penal statute must be taken to have a meaning in their ordinary sense. *Medicine*, in its ordinary sense, as applied to human ailments, means something which is administered, either internally or externally, in the treatment of disease, or the relief of sickness. It may be applied externally, and it need not be a substance which may be seen and handled; it may be electricity; he whose profession it is to prescribe and administer this [*i.e.*, medicine], after diagnosing the complaint, is a physician; the statute would include a medical clairvoyant (citing Bibbon *v.* Timpson, 59 Me., 181; Wilson *v.* Harrington, 72 Wis., 591) and bone-setting in dislocations and fractures, and reducing sprains, swellings, and contraction of sinews by friction and fomentation (citing Hewitt *v.* Charier, 16 Pick., 353), but not Christian Science, as disclosed by the testimony in this case. Kansas City *v.* Baird, 92 Mo. App., 204.

A dentist is not a practitioner of medicine, and is therefore not exempt from jury duty. State *v.* Fisher, 119 Mo., 344.

[5] A municipal ordinance of Kansas City required *every physician* to report certain contagious diseases; the accused was charged with its violation; it appeared that she was a *Christian Scientist*, who attended in a case of such disease, under agreement to receive pay therefor; *held*, that the accused was not a *physician*, and not amenable to the ordinance. In a broad sense there may be a *physician* for the soul, but the statute does not include those prescribing moral doctrine for the morally infirm. Kansas City *v.* Baird, 92 Mo. App., 204.

For a discussion of testimony indicating the views and contentions of *Christian Scientists* see Kansas City *v.* Baird, 92 Mo. App., 204.

[6] A person with a diploma from a medical college in good standing (so held under a former law) is not required by law to submit to examination, and the State board cannot require it. State *v.* Lutz, 136 Mo., 633.

[7] The power of the board does not extend to discriminating against any particular school or system of medicine; should such discrimination occur, the limits of discretionary power would have been passed (so held of Act of 1883). State *ex rel.* Granville *v.* Gregory, 83 Mo., 123.

in part in writing, and shall be of elementary and practical character, but sufficiently strict to test the qualifications of the candidate as a practitioner, and shall embrace anatomy, chemistry, physiology, pathology, therapeutics, obstetrics, gynecology, surgery, practice of medicine, medical jurisprudence, and hygiene, and such other branches as the State board may direct. Candidates are required to answer seventy-five per cent of such questions as are asked, before receiving a certificate; *provided* the examination in therapeutics shall be conducted by the member or members of the board who represent the system of medicine of which the applicant has been a student.[1]

If there be no representative of such school or system, the examination in therapeutics shall be conducted by an examiner appointed for the purpose by the governor of Missouri, but all examinations other than in therapeutics shall be conducted as heretofore provided in this act (*ib.*, s. 3).

LICENSE.—The board of health shall issue to such persons as they shall find upon examination to possess the requisite qualifications a license to practise medicine and surgery in accordance with the provisions of this act (*ib.*, s. 3).

SYSTEMS OF MEDICINE.—The board shall not be permitted to favor any particular school or system of medicine, but all applicants shall be subjected to the same examination, and the same degree of proficiency shall be required of all (*ib.*, s. 3).[1]

EXAMINATION THROUGH INTERPRETER.—The board shall examine all persons applying for a license, though such persons cannot speak English, the applicant in all such cases to pay the expenses of an interpreter satisfactory to the board (*ib.*, s. 3).

LICENSE WITHOUT EXAMINATION.—The board may at its discretion admit without examination, legally qualified practitioners of medicine who hold certificates to practise medicine in any State or Territory of the United States or the District of Columbia, with equal requirements to Missouri, and that extend like privileges to legally qualified practitioners of this State. The applicant must pay a fee of $25 (*ib.*, s. 3, as amd. 1905, p. 212).

RECORDING.—The certificate must be recorded in the office of the county clerk of the county in which the holder resides and the record must be indorsed thereon; a person moving to

[1] See p. 332, n. 7.

another county to practise must have the certificate recorded in the county to which he removes (*ib.*, s. 4).

The county clerk shall keep a complete list of licenses recorded by him, with date of issue (*ib.*, s. 4).

OFFENCE—NEGLECT TO RECORD LICENSE.—Any person neglecting for twenty days to record his license as in section 4 provided, after entering upon the practice, shall be guilty of a misdemeanor, and punishable with a fine of from $10 to $50, and, on failure to record said license for thirty days after conviction, such person shall be liable to a fine of not less than $100 (*ib.*, s. 4).

OFFENCE.—Any person, except physicians[1] now registered[2] (March 12th, 1901), practising medicine or surgery in the State and any person attempting to treat the sick[3] or others afflicted with bodily or mental infirmities without first obtaining a license as provided in this act, shall be deemed guilty of a misdemeanor,[4] and punishable with a fine of from $50 to $500, or imprisonment in the county jail for from thirty days to one year,

[1] Where a law of the State made it unlawful for a *physician* or *pretended physician* to issue a prescription for intoxicating liquor not to be used for medicinal purposes, it was held that a person indicted under said law as a *physician* need not be a *registered physician* to be guilty under the indictment. State *v.* Anthony, 52 Mo. App., 507. See Appendix, p. 693.

[2] Under a former law (Act April 2d, 1883) graduates of medicine were entitled to a certificate upon presentation of their diplomas; *held*, that an institution incorporated as a medical college will be presumed to have the power to issue diplomas to its graduates; that it was essential, however, to entitle the holder of such diploma to a certificate, that he show, to the satisfaction of the board, that the institution was in good standing; and that the determination of the question of good standing involved a judicial discretion on the part of the board; that the court could not usurp the functions of the board by determining an institution to be in good standing, and would not compel the issue of a certificate by mandamus, where the board had refused to issue one, exercising its judicial discretion in so refusing. State *ex rel.* Granville *v.* Gregory, 83 Mo., 123.

Under a former law (Acts 1877, p. 343), a former practitioner (though he kept a drug store) was entitled to register, though he had no diploma. State *v.* Francis, 8 Mo. App., 584.

For discussion (under former law, Rev. Stats. 1879, s. 6,302, etc.) of who was an *existing practitioner* entitled to register, see Davidson *v.* Bohlman, 37 Mo. App., 576.

Physicians who registered under the law of 1874 have not been required by any subsequent law to register again (so held in 1902). State *v.* Morgan, 96 Mo. App., 343.

[3] Under a former law (Feb. 17th, 1847) it was necessary in order to sustain an indictment, that the accused should have received compensation, but it was not necessary for the State to prove the receipt of compensation. State *v.* Hale, 15 Mo., 606 (1852).

[4] Under former law (Rev. Stats. 1879, s. 6,302, etc.) it was held that a person guilty of a misdemeanor in practising without having complied with the law was prohibited from recovering compensation for services rendered as a physician or surgeon; and that in order to *practise medicine* in violation of the act it was not necessary that the practitioner should give internal remedies; that the obvious intent of the statute was to em-

or both, for each and every offence; treating each patient shall be regarded as a separate offence; filing or attempting to file as his own the license of another, or a forged affidavit of identification, is a felony punishable with such fine and imprisonment as forgery in the second degree (*ib.*, s. 5).

Refusal—Revocation.—The board may refuse a license to individuals guilty of unprofessional or dishonorable conduct, and may revoke licenses for like cause after giving the accused an opportunity to be heard in defence before the board (*ib.*, s. 7).

Habitual drunkenness or excessive use of narcotics or producing criminal abortion shall be deemed unprofessional and dishonorable conduct within the meaning of this section, but this specification is not intended to exclude all other acts for which licenses may be revoked (*ib.*).

Exceptions.—This act does not prohibit gratuitous services to and treatment of the afflicted, and the act does not apply to commissioned surgeons of the United States army, navy, and marine hospital service, nor to any student who has matriculated in any medical college of this State on or prior to March 12th, 1901.[1] It shall be the duty of said board, on receiving a fee of $15 from said student, to issue to him a license to practise medi-

brace any person who habitually holds himself out as a professor of the art of healing diseases; and under the facts of the case before it the court held that *electric treatment*, rendered by a person who rendered a bill for his services, styling himself "*Dr.*" in his bill, was the *practice of medicine*, and that he could not recover for such treatment, rendered by him while he was not a registered physician; though the court admitted that states of fact might be imagined when it would become a question for the jury, under proper instructions, to determine whether a person suing for services was or was not practising medicine or surgery. Davidson *v.* Bohlman, 37 Mo. App., 576 (1889).

Under the Rev. Stats. 1879, sec. 6,304, a physician who violated the law was expressly denied the right to recover compensation for his services; under Rev. Stats. 1889, secs. 6,871, 6,881, this prohibition was omitted, and a violation of the act was declared a misdemeanor subject to fine and imprisonment; *held* (distinguishing Davidson *v.* Bohlman, 37 Mo. App., 576, decided under the earlier law), that it was not the intention of the legislature under the later law to deprive the physician who practised in violation of the law of his right to compensation for services; that where the contract was not prohibited by law, and had been fully performed by the physician, he could recover compensation, though guilty of a misdemeanor in practising without a proper certificate or license. Smythe *v.* Hanson, 61 Mo. App., 285 (1894; see *contra*, p. 330, n. 2).

For form of indictment (under Rev. Stat. 1889, c. 110, art. 1), see State *v.* Hathaway, 106 Mo., 236.

[1] A person already graduated from a medical college is not affected by rules sent to the college by the State board of health after his graduation. State *v.* Lutz, 136 Mo., 633.

Good standing, as used in the statute, means good reputation, and must be proved in the same way. *Ib.*

cine when he presents a diploma from any medical college of this State[1] (*ib.*, s. 9, as amd., Act 1903, p. 240).

FEES.—To the board, for examination for a license, $15 (*ib.*, s. 6). If such examination prove unsatisfactory and the board refuse to issue a license thereon, the applicant failing to pass such examination may return at any meeting within the next twelve months thereafter and be examined without extra charge, but no temporary license shall be issued to such person (*ib.*).

To the board, from applicant from other State, Territory, or District, under sec. 3, $25 (*ib.*, s. 3 as amd. 1905, p. 212).

To the clerk, for recording a license, $1, to be paid by the person offering it for record. To the clerk of a county to which a licensed practitioner removes, for recording the license, the usual fees to be paid by the holder (*ib.*, s. 4).

To the board, from a student under section 9, as amended 1903, for license on presentation of his diploma, $15 (*ib.*, s. 9, as amended, Act 1903, p. 240).

To the board, from applicant for midwife's license, $5 (Act 1901, p. 207, s. 10).

MIDWIFERY.—It is unlawful for any person to practise midwifery before receiving a license to do so. Every person desiring to practise midwifery as a profession shall make application to the State board of health for examination and pay a fee of $5, and, on passing an examination satisfactory to the board on the subject of obstetrics, shall receive a license to practise as above provided. It shall be unlawful for any person licensed as a *midwife* (*sic!*) only, to engage in any other branch of medical practice, or to advertise herself as doctor, doctress, or physician, or to use any letters before or after her name on a sign or otherwise indicating that she is authorized to or does engage in any other branch of medical practice. Any person practising midwifery as a profession or advertising herself as a midwife without first obtaining the license aforesaid, and any licensed midwife who

The board cannot establish rules of its own to fix what is good standing. *Ib.*

Mandamus would not lie if the board had determined that the college was not in good standing, for that is within the judgment and discretion of the board. State *v.* Lutz, 136 Mo., 633.

[1]A diploma is defined, and the implied powers of a medical college to issue one to its graduates are discussed in State *ex rel.* Granville *v.* Gregory, 83 Mo., 123, and it is there stated that diplomas have been issued by such institutions since the thirteenth century, citing 2 Kent's Comm., 270.

shall do any acts in this section prohibited, shall be guilty of a misdemeanor and punishable by a fine of from $10 to $50, or by imprisonment in the county jail not more than two months nor less than ten days. Acting in each case is deemed a separate offence. Nothing in this section is to be construed to require women practising midwifery to obtain a license when said women do not practise midwifery as a profession and do not make any charge for their services (Act 1901, p. 207, s. 10).

St. Louis.—The duty and service provided in this act to be performed by any county clerk, shall in the city of St. Louis be performed by the health commissioner. The health commissioner shall receive the same compensation as this act provides for the county clerk. The word county in this act includes the city of St. Louis (*ib.*, s. 8).

Osteopathy—State Board of Osteopathic Registration and Examination consists of five reputable osteopathic physicians, appointed by the governor, having the qualifications required by this section. The board shall formulate rules to govern its actions; its president and secretary have power to administer oaths. The board meets at such times and place as a majority may appoint. Three members constitute a quorum, but no certificates to practise osteopathy shall be granted on an affirmative vote of less than three.

The board keeps a record of its proceedings and a register of all applicants for certificates, giving the names and location of the institution granting the applicant the degree of doctor or of diplomate in osteopathy, the date of his diploma, and also whether the applicant was rejected or a certificate granted. The books and register are *prima facie* evidence of all matters recorded therein (Act 1903, p. 248, s. 1).

Osteopathy—Qualification.—Any person before engaging in the practice of osteopathy shall, on payment of $10, make application for a certificate to practise osteopathy, to the secretary of the board, on a form prescribed by the board, giving his name, age, which shall not be less than twenty-one years and *resident* (*sic!*); the name of the school of osteopathy from which he or she has graduated, which shall have been in good repute as such at the time of the issuing of his diploma, as determined by the board; the date of his diploma, with evidence that such diploma was granted on personal attendance and completion of

the course of study of not less than four terms of five months each, and such other information as the board may require (*ib.*, s. 2).

Osteopathy — Examination — Exceptions. — The board may in its discretion subject all applicants to an examination in anatomy, physiology, physiological chemistry and toxicology, osteopathic pathology, diagnosis, hygiene, obstetrics and gynecology, minor surgery, principles and practice of osteopathy, and such other subjects as the board may require, *provided* that any person having a diploma from a legally chartered school or college of osteopathy, in good standing as such at the time of issuing such diploma, and who shall meet the requirements of the board in other respects, who is in active practice in this State at the time of the passage of this act (March 27th, 1903), may be granted a certificate by the board to practise osteopathy in the State without examination and upon the payment of $1 to the board for the certificate; *providing*, further, that the board may in its discretion dispense with an examination in the case, first, of an osteopathic physician duly authorized to practise osteopathy in any other State or Territory or the District of Columbia, who presents a certificate of registration or examination by the legally constituted board of such State, Territory, or the District of Columbia, accorded only to applicants of equal grade with those required in Missouri (*ib.*).

Osteopathic Physicians shall observe and be subject to the State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, and such reports shall be accepted by the officer or department to whom such report is made (*ib.*, s. 4).

Osteopathy—Recording.—Every person holding a certificate from the State board of examination and registration shall have it recorded in the office of the county clerk in the county in which he expects to practise, and in the cities of St. Louis, Kansas City, and St. Joseph they shall record the same with the same official *which* (*sic!*) records the certificate of graduates of any other school of medicine, and the date of recording shall be indicated thereon. Until such certificate is filed for record the holder shall exercise none of the rights or privileges conferred therein. The county clerk or city health commissioner is re-

quired to keep a complete list of all certificates recorded by him, with the date of recording (*ib.*, s. 4).

OSTEOPATHY—OFFENCE—PENALTY.—Any person who shall practise or attempt to practise or use the science or system of osteopathy in treating diseases of the human body; or any person who shall buy, sell, or fraudulently obtain any diploma, license, record, or registration to practise osteopathy illegally obtained, or signed or issued unlawfully or under fraudulent representations; or who, after conviction of felony, shall practise osteopathy, or who shall use any of the forms or letters "osteopathy," "osteopath," "osteopathist," "diplomate in osteopathy," "D.O.," "osteopathic physician," "doctor of osteopathy," or any other title or letters, either alone or with qualifying words or phrases, under such circumstances as to induce the belief that the person who uses such terms is engaged in the practice of osteopathy, without having complied with the provisions of this act, is guilty of a misdemeanor, and punishable by a fine of from $50 to $500, or imprisonment in the county jail thirty days to one year, or both (*ib.*, s. 6).

OSTEOPATHY—FEES.—On application for certificate, $10 (*ib.*, s. 2).

From practitioner at time of passage of Act of 1903, $1 for certificate (*ib.*).

To the official recording a certificate, $1 for making the record (*ib.*, s. 5).

All fees are required to be paid in advance to the treasurer of the board (*ib.*, s. 3).

[OSTEOPATHY.[1]—The system, method, or science of treating diseases of the human body, commonly known as osteopathy, and as taught and practised by the American School of Osteopathy of Kirksville, Missouri,[2] is declared not to be the practice of medicine and surgery[3] within the meaning of article 1 of this

[1] Sections 8,537, 8,538, and 8,539 of the Revised Statutes of 1899 are inserted here because they were not specifically repealed by Act 1903, p. 248, though there is an evident inconsistency between some of the provisions of the later law and similar provisions of the Revised Statutes.

[2] The Kirksville (Mo.) School is the mother institution of osteopathy. State *v.* Nat. School of Osteopathy, 76 Mo., 439.

[3] Whether a practitioner of osteopathy should qualify as a practitioner of medicine and surgery was put at rest by an act of the legislature (1897, p. 206), declaring that osteopathy should not be considered the practice of medicine and surgery within the meaning of the medical law. *Ib.*

chapter (*i.e.*, ss. 8,507–8,518, c. 128 of Revised Statutes, 1899),' and not subject to the provisions of said article (*ib.*, s. 8,537).]

[Qualification to Practise Osteopathy.[2]—Any person having a diploma issued by said school of osteopathy, or any other legally chartered and regularly conducted school of osteopathy, who shall have been in personal attendance in such school for at least four terms of not less than five months each before graduation,[3] shall be authorized to treat diseases of the human body according to such system, after having filed such diploma for record with the clerk of the county court of the county in which he proposes to practise, with an affidavit that the diploma is genuine, and that he or she is the person to whom the same was issued, and that all the provisions of this article (*i.e.*, ss. 8,537, 8,538, 8,539, c. 128 Revised Statutes, 1899[1]) were fully complied with before the issuing of such diploma; and the clerk shall record the diploma and indorse on the diploma the date of filing and recording, for which he shall receive $1 (*ib.*, s. 8,538).]

[Offence—Penalty.[2]—To practise or pretend or attempt to practise or use the system, method, or science of osteopathy in treating diseases of the human body without having complied with the provisions of this article is a misdemeanor, punishable with a fine of from $50 to $100 for each offence, *provided* nothing herein shall be construed as prohibiting any legally authorized practitioner of medicine or surgery from curing or relieving disease, with or without drugs or by any manipulation by which any disease may be cured or alleviated (*ib.*, s. 8,539).]

[1] Article 1 of ch. 128 of the Revised Statutes 1899 was repealed by Act 1901, p. 207, and the latter act was enacted in lieu thereof (Act 1901, p. 207, s. 11), but the provisions of the Revised Statutes respecting *Osteopathy*, which constituted Article IV. of ch. 128, were not repealed by the said Act of 1901, nor specifically by the osteopathy law of 1903 (p. 248); see note 1, p. 339.

[2] See note 1, p. 339.

[3] Under the Act of 1897, p. 206, the legislature intended that as a condition precedent to the issue of a diploma, a graduate must have attended the school as a student four terms of not less than five months each; and a school of osteopathy chartered under the laws of this State shall not issue a diploma without such attendance. In issuing a diploma, after examination, to one who showed himself competent on such examination, and who was in fact proficient, but who had not so attended, the school committed an unlawful act; but where the school officers issued their diploma in good faith under such circumstances and after consulting counsel and being advised that they were empowered, the Court will not declare a forfeiture of the charter of the school. State *v.* Nat. School of Osteopathy, 76 Mo. App., 439.

MONTANA.[1]

BOARD OF EXAMINERS.[2]—The governor, with the advice and consent of the Senate, appoints seven learned, skilled, and capable physicians who have been residents for not less than two years, no more than two from the same county, and who have attended three courses of lectures, and are graduates of accredited colleges of medicine, to constitute the board of examiners (Political Code, 1895, s. 600).

Meetings of the board are required to be held at the seat of government on the first Tuesday of April and October in each year, and at other times at the same and other places as the board may determine. The board must keep a record of all applicants for a certificate, with their age, time spent in the study of medicine, and the name and location of all institutions granting to applicants degrees or certificates of lectures in medicine or surgery, and whether the applicant was rejected or received a certificate, and the register is *prima facie* evidence of matters therein recorded (*ib.*, s. 601).

QUALIFICATION—EXAMINATION.—Every person[3] wishing to

[1] Such legislation has always been upheld as a wise exercise of the police powers of the State, and necessary to the protection of the public. One may be prohibited from pursuing such a calling or profession until he has been examined by the lawfully constituted authorities and declared sufficiently qualified to engage in it with safety to the public.

The legislature, in the exercise of its legitimate power, has prescribed the conditions precedent upon the fulfilment of which one may begin and continue the practice of medicine and surgery, and has prohibited it in all other cases. The courts have no power to suspend the operation of the will of the legislature thus declared, and usurp the authority lodged in the board; the prohibition directed to the individual citizen is as much a limit to the power of the court as if it had provided that the court should not grant permission to pursue the practice pending the appeal in cases of a refusal of certificate. State *ex rel.* State Board of Medical Examiners *v.* District Court, 26 Mont., 121.

[2] For a judicial summary of the various powers of the board see State *ex rel.* State Board of Medical Examiners *v.* District Court, 26 Mont., 121.

Under former Act (Feb. 28th, 1889) all graduates, who commenced to practise medicine in the State after its passage, were required to submit to examination. State *v.* Board, 10 Mont., 162; 25 Pac. R., 440; Craig *v.* Board, 12 Mont., 208; 29 Pac. R., 532.

[3] Every person has a natural right to pursue any lawful business or profession, subject, however, to compliance with all reasonable police regulations made by the State touching the qualifications declared necessary for the particular calling. In the absence of such regulation the right is absolute and may be exercised at pleasure; but where they exist compliance is a condition precedent, and until this condition is fulfilled, the right is in abeyance and may not be exercised at all. State *ex rel.* State Board of Medical Examiners *v.* District Court, 26 Mont., 121.

practise medicine or surgery in any of their departments shall apply to the board for a certificate. Every person must present his or her diploma to the board for verification as to its genuineness. If it be found genuine and issued by a medical school legally organized and in good standing, whose teachers are graduates of a legally organized school, which facts the board determines, and if the person presenting and claiming the diploma be the person to whom it was originally granted, and at the time and place designated by the board, or at a regular meeting, the applicant shall submit to an examination[1] in anatomy, physiology, chemistry, histology, materia medica, therapeutics, preventive medicine, practice of medicine, surgery, obstetrics, diseases of women and children, diseases of the nervous system, diseases of the eye and ear, medical jurisprudence, and such other branches as the board may deem advisable, and present evidence of having attended four courses of lectures of at least six months each; but such evidence of having attended four courses of lectures shall not be required of applicants graduating prior to July 1st, 1898; the examination must be both scientific and practical, and of sufficient thoroughness and severity to test the candidate's fitness to practise medicine and surgery. When desired the examination may be held in the presence of the dean of any medical school or of the president of any medical society in the State. After the examination, the board must grant to a candidate who is found qualified a certificate to practise medicine and surgery. Such certificate can only be granted by the consent of not less than four members of the board (*ib.*, s. 602).

Temporary Certificates.—During the intervening period of the sessions of the board, any person desiring to practise medicine in the State may present his or her diploma to the president or secretary of the board, who may issue a certificate good until the next regular meeting of the board (*ib.*).

Refusal—Revocation.—The board may refuse to grant a certificate for unprofessional, dishonorable, or immoral conduct. Before a certificate can be refused for such cause, the board must serve in writing upon the applicant a copy of any charge or charges against him, and appoint a day for hearing, at which the applicant or any witness in his behalf may appear and give testimony in refutation of such charges. In case of a refusal

[1] See p. 341, n. 2.

of a certificate after such hearing, the decision specifically stating the ground of refusal must be reduced to writing and a copy delivered to the applicant on his demand. On a like hearing the board may refuse a certificate to any one who may publicly profess to cure or treat disease, injury, or deformity in such a manner as to deceive the public. The hearing provided for herein must take place within twenty days after service of a copy of the charges on the applicant unless delayed by, or further time is granted to, the applicant, and the decision must not be later than ten days after the hearing; if not rendered within said ten days, the applicant is not subject to any penalties for practising without a certificate during the time that elapses before a decision is made.

The board, with the concurrence of four members, may revoke [1] a certificate for unprofessional, dishonorable, or immoral conduct, on written charges served on the holder.[2] The proce-

[1] The board possesses no power to revoke a certificate without notice of a charge preferred against the holder. State *v.* Schultz, 11 Mont., 429; 28 Pac. R., 643, citing People *v.* McCoy, 125 Ill., 289.

[2] The complaint before the medical board is the original pleading; the board is a special tribunal and is not composed of persons required to be learned in the law; pleadings before it should not be too strictly construed; but the complaint must set forth facts which constitute an offence; the defendant must be notified of the charge, and he must be charged with something; he has the right to demand the nature and cause of the accusation (Const., Art. 3, s. 16); the complaint must set out facts which constitute unprofessional, dishonorable, or immoral conduct. It is professional, and not immoral or dishonorable, that in a case of premature delivery and accident, commonly called a miscarriage, a physician should become possessed of a fœtus; and it is not unprofessional, immoral, or dishonorable to destroy such a fœtus, nor to incinerate it, nor to so destroy it with the intent to conceal the fact of its premature delivery; there are such deliveries which are accidental, unintentional, and wanting in all criminal procurement, intent, or act; a court will not presume, in the absence of a charge, that a fœtus came from a criminal act instead of an innocent one, and it must be assumed, when no criminal act is charged, that the fœtus was produced by no criminal act. It is not immoral, dishonorable, or unprofessional for a physician to conceal the fact that one of his patients has innocently suffered the accident of a fœtal miscarriage; nor to refuse at a coroner's inquest to state the name of his patient; there is a prevalent belief that it would be unprofessional and dishonorable to give the name without the patient's consent, or unless required to do so. State *v.* Kellogg, 14 Mont., 426; 36 Pac. R., 957.

The spirit of the American law is such that a doctor to be tried for professional misfeasances is as much entitled to a clear charge and specification as has a burglar or murderer the right to a definite specific indictment (*ib.*).

The court declines to determine whether a doctor's refusal to testify on the ground that his testimony would incriminate him can be used against him on a trial for immoral, dishonorable, or unprofessional conduct. State *v.* Kellogg, 14 Mont., 426; 36 Pac. R., 957.

The refusal of a physician to testify on the ground that his testimony

dure on such charges is regulated in detail by the act.[1] In cases of refusal or revocation of a certificate, the aggrieved person may appeal[2] to the district court of the county of such revocation or

would incriminate him is not in itself immoral, dishonorable, or unprofessional (*ib.*).

A complaint which merely states suspicious circumstances does not charge immoral, dishonorable, or unprofessional conduct, and the accused physician should not be required to prepare for trial on a complaint merely stating a suspicion. *Ib.*

The American system of judicial procedure does not sanction throwing suspicion on a defendant and leaving him to prove himself innocent. *Ib.*

Where the complaint does not set forth facts specifying immoral, unprofessional, or dishonorable conduct, the judgment of conviction on such complaint must be set aside on appeal, regardless of whether the evidence at the trial did or did not prove conduct immoral, unprofessional, or dishonorable. *Ib.*

[1] Under a former act in which the procedure was not prescribed, it was held that an appeal is not nugatory because the legislature failed to prescribe rules of practice on such appeal; nor is the board of medical examiners without jurisdiction because the statute prescribes no procedure. The legislature contemplated that such proceedings should be conducted in such an orderly manner that no substantial right would be denied the accused. State *ex rel.* Kellogg *v.* District Court, 13 Mont., 370; 34 Pac. R., 298 (1893), citing State *v.* Schultz, 11 Mont., 429; 28 Pac. R., 643.

The legislature in placing the case within the jurisdiction of the district court on appeal, contemplated that the court would adopt such appropriate procedure as would vouchsafe to the accused and to the prosecution a proper hearing, and thereupon such judgment would be pronounced as the law and justice of the case would warrant on the facts shown; and that the court being clothed with the power to try the case and pronounce judgment, would apply the appropriate procedure. In such cases a court must direct the course of its own procedure without special provision of statute made for those particular cases. State *ex rel.* Kellogg *v.* District Court, 13 Mont., 370; 34 Pac. R., 298.

On the proper procedure to restore to the district court an appeal which it has erroneously dismissed for want of jurisdiction, see State *ex rel.* Kellogg *v.* District Court, 13 Mont., 370; 34 Pac. R., 298; State *ex rel.* Serres *v.* District Court, 19 Mont., 501; 48 Pac. R., 1,104.

Whether the right to practise medicine is property or not, it is a valuable franchise and one of which a person ought not to be deprived without being offered an opportunity by timely notice to defend it. Quoted from People *v.* McCoy, 125 Ill., 289, in State *v.* Schultz, 11 Mont., 429; 28 Pac. R., 643.

[2] Under the Montana statute *mandamus* will not issue in cases where there is a plain, speedy, and adequate remedy in the ordinary course of law. The medical law (so held of the law of Feb. 28th, 1889) contemplated the subjection of the final act of the board in refusing a certificate, as well as in revoking a certificate, to the supervising control of the district courts; and the remedy for the wrongful denial or revocation of a certificate is an appeal, and not the writ of mandamus. State *ex rel.* Narcross *v.* Board of Medical Examiners, 10 Mont., 162; 25 Pac. R., 440 (1890).

An applicant for examination was (it was alleged) detected upon an examination in using notes and memoranda to aid him in answering the questions propounded, and was denied the privilege of continuing the examination and was then accused, by the secretary of the board, in a charge preferred by him to the board, against the applicant, of unprofessional, dishonorable, and immoral conduct, by reason of such use of the notes and memoranda. After written notice and examination by the board into the facts, he was found guilty and refused a certificate; he appealed to the district court and applied to the court for an order permitting him

refusal.[1] The appeal is regulated in detail by the act, and is tried by a jury of six physicians,[2] not less than two of whom shall be of the same school of medicine as the appellant. An appeal bond with two sureties in the sum of $300 is required[3] (*ib.*, s. 603, as amended, Act 1903, c. 95).

to engage in the practice of his profession until a hearing could be had on the merits; the judge required him to submit to an examination in open court as to his qualifications, and thereupon made an order in terms authorizing and empowering the applicant to practise medicine and surgery in Montana pending his appeal. The State, on the relation of the board of medical examiners, applied to the Supreme Court for a writ of certiorari, and on the application the Supreme Court, after pointing out that the law at the time empowered the district court to make such an order in case of revocation, but was silent as to the case of refusal of a certificate, *held*, that it was not within the power of the district court to exercise the right of making such an order in the case of a refusal of a certificate, though it indicated that, in case of revocation, the district court could exercise the statutory power, which in case of refusal of a certificate was denied to it. The people have a right to have the law administered according to its manifest spirit and purpose, and consequently the order issued by the district court was annulled. State *ex rel.* State Board of Medical Examiners *v.* District Court, 26 Mont., 121 (1901).

[1] The Montana Constitution, Art. 8, s. 11, does not limit the appellate jurisdiction of the District Courts to appeals from justices and inferior courts, and the legislature may vest these courts with jurisdiction of appeals from determinations of the board of medical examiners. State *ex rel.* Kellogg *v.* District Court, 13 Mont., 370; 34 Pac. R., 298 (1893).

[2] The statute does not restrict the right of appeal to any particular class of cases. Awkward, difficult, and unsatisfactory as a trial of the case may be, on appeal to the district court, where the applicant is rejected on the ground that he shows by his examination that he is not possessed of sufficient learning (so held, of the law before this provision for a jury of physicians was inserted), nevertheless the district judge could devise ways and means not incompatible with the code for disposing of the case. Under the law the rejected applicant is entitled to prosecute his appeal, and the courts cannot by judicial legislation deny it. Whether or not such laws are wise or unwise is a question for the legislature, and the courts should not invade the domain. State *ex rel.* Serres *v.* District Court, 19 Mont., 501; 48 Pac. R., 1,104.

[3] A stay of the effect of a judgment of a trial court revoking a license, if regarded as discretionary, will not be ordered by the Supreme Court, where application for a stay has been made to the trial court and refused, and where it does not appear to the Supreme Court that the trial court has abused its discretion in refusing the stay. Board of Medical Examiners *v.* Kellogg, 14 Mont., 243; 36 Pac. R., 48.

An order to stay proceedings, pending appeal, on a judgment of revocation of a license, stays enforcement of costs, but the court declines to determine whether such stay would protect the appellant from prosecution and the penalty for practising medicine without a license pending the appeal, especially if the judgment of revocation should be affirmed. Board of Medical Examiners *v.* Kellogg, 14 Mont., 243; 36 Pac. R., 48.

Subsequent to this decision the following clause was inserted in sec. 603: "In case of appeal from a decision revoking a certificate, the appellant may be permitted, in the discretion of the court, to practise during the pendency of the appeal," but it was omitted when sec. 603 was amended by Act 1903, c. 95.

For distinction between the right to continue practice pending appeal in case of revocation and pending appeal in case of refusal of certificate, see State *ex rel.* State Board of Med-

RECORDING.—Certificates must be recorded within sixty days after their date in the office of the county clerk in the county where the holder resides; or in case of removal to another county to practise medicine or surgery, certificates must be recorded in the county to which the holder removes. The county clerk must indorse on the certificate the date of its record (*ib.*, s. 604). Until the certificate is recorded the physician practising under it is subject to the penalties prescribed in the penal code for practising without a certificate (Political Code, 1895, s. 603).

EXCEPTIONS.—All physicians and surgeons who hold certificates granted by the board of examiners existing at the time of the passage of this act are exempt from the provisions of section 602 (*ib.*, s. 602).[1] The act does not apply to midwives of skill and experience, nor to commissioned surgeons of the United States army and navy in the discharge of their official duties, nor to physicians or surgeons in actual consultation from other States and Territories (*ib.*, s. 605).

OFFENCE—PENALTY.—Practising medicine or surgery contrary to the provisions of the act is a misdemeanor,[2] punishable with a fine of from $100 to $500, or imprisonment in the county

ical Examiners *v.* District Court, 26 Mont., at p. 126.

The legislature did not intend to clothe the medical board with the arbitrary power to revoke the certificate of a physician without a reasonable notice of the charge against him and the time and place of the trial thereof; the statute (a former act) by its mere silence respecting the procedure cannot be so construed. The decision of the board in this matter is not final, and upon an appeal, the courts may declare null and void its proceedings. State *v.* Schultz, 11 Mont., 429; 28 Pac. R., 643.

[1] The requirement that persons who graduated before the passage of the Act, but who commenced to practise in the State after the passage of the Act, shall submit to examination, but excusing from examination graduates who commenced to practise in the State before the passage of the Act, is not an unjust discrimination against the rights and privileges of citizens of another State, and does not violate U. S. Const., Art. 4, s. 2, nor U. S. Const., Amdt. 14, s. 1. Craig *v.* Board of Medical Exrs., 12 Mont., 203, 29 Pac. R., 532, citing State *v.* Dent, 129 U. S., 114.

[2] On a trial under an indictment for practising without a certificate, the accused should be allowed to show that he had appealed from a decision of the board revoking his certificate and that the appeal was pending; and where it appeared on such trial that the revocation had been made without notice of the charges to the holder, the court should have instructed the jury that the certificate had not been revoked and was in full force. State *v.* Schultz, 11 Mont., 429; 28 Pac. R., 643.

Where a physician was convicted of practising without a license, and his conviction was based on evidence of practice after a revocation of his license after a trial in a district court, and the judgment of revocation was subsequently reversed in the Supreme Court, the conviction should also be reversed on appeal to the Supreme Court. State *v.* Kellogg, 14 Mont., 451; 36 Pac. R., 1,077

jail from thirty to ninety days, or both, as the court may determine (*ib.*, s. 606; Penal Code, 1895, s. 706).

DEFINITION.—Any person is regarded as practising within the meaning of the act who appends "M.D." to his or her name, who shall profess publicly to be a physician or surgeon, or who shall recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury, or other deformity, after having received or with the intent of receiving therefor either directly or indirectly any bonus, gift, or compensation (*ib.*, s. 606).

RE-EXAMINATION.—Any one failing to pass the required examination is entitled to a second examination within six months without fee (*ib.*, s. 607).

FEES.—To the secretary of the board, in advance for examination, $15, which shall defray the entire expense of the candidate for examination (*ib.*, s. 607).

To the county clerk, for recording, the usual fee (*ib.*, s. 604).

OSTEOPATHY—STATE BOARD OF OSTEOPATHIC EXAMINERS.—This board, appointed by the governor, consists of three qualified practising resident osteopaths, each a graduate of a legally authorized school of osteopathy (Act 1901, p. 48).

The president and secretary have power to administer oaths. The board holds meetings for examinations at the State capital on the first Tuesday in March and September of each year, and such other meetings as may be deemed necessary, each session not to exceed three days (*ib.*, s. 2).

QUALIFICATION.—The board is required to issue certificates of qualification to all applicants having a diploma from a legalized, recognized, and regularly conducted school of osteopathy as such at the time it was issued, or who pass the required examination as provided in section 4 of this act; such certificates are conclusive of the right of the lawful holder to practise osteopathy in the State. The board is required to keep a register of all applicants for a license, together with his or her name and age and time spent in the study and practice of osteopathy; and the name and location of the school or institute of osteopathy from which said applicant holds a diploma; and shall keep a register

which shall show the names of all applicants licensed or that are rejected under this act. Said book is *prima facie* evidence of all matters recorded therein (*ib.*, s. 2).

It shall be unlawful for any person to practise osteopathy in this State without a license from said board; provided that all persons practising osteopathy within this State prior to the passage of this act (February 26th, 1901), and holding a diploma from a legally authorized school of osteopathy of good repute as such, and wherein the course of study comprises twenty months or four terms of five months each, and shall have been in personal attendance at said school not less than eighty per cent of the required time, may be licensed to practise osteopathy in this State by submitting to said board such a diploma and satisfying the board that they are the legal holders thereof, or by undergoing an individual examination as hereinafter provided, at a regular meeting of said board for examination (*ib.*, s. 3).

Osteopathy—Temporary Certificate.—The secretary of the board of osteopathic examiners may upon examination grant a certificate to an applicant to practise osteopathy until the next meeting of said board, when he shall report the facts; at which time the temporary certificate shall expire. Such temporary certificate shall not be granted after the board has once rejected an applicant (*ib.*, s. 4).

Osteopathy—Examination.—All persons after March 1st, 1901, commencing the practice of osteopathy in this State, in any of its branches, shall apply to said board for a license so to do, and such applicant, at the time and place designated by said board, shall submit to an examination in anatomy, physiology, chemistry, pathology, gynæcology, obstetrics, and theory and practice of osteopathy, and such other branches as are taught in well-regulated and recognized schools of osteopathy, and deemed advisable by said board, and shall present evidence of having actually attended for at least twenty months, or four terms of five months each, a legally authorized and regularly conducted school of osteopathy recognized by said board.

All examination papers on subjects peculiar to osteopathy shall be examined and their sufficiency passed on by the members of said board, whose decision shall be final thereon, subject to appeal to the district court of the county in which the examination is held. The district court shall review such examination

without a jury and may take testimony thereon, and its decision shall be subject to appeal to the Supreme Court by any persons aggrieved thereby; and, on such appeal, the Supreme Court shall have the right to consider questions of both law and fact.

The board shall require the examination to be scientific and practical, but of sufficient severity to test the candidate's fitness to practise osteopathy (*ib.*, s. 5).

Osteopathy—License.—After examination the board shall grant a license to such applicants as shall pass the examination to practise osteopathy in Montana. The license shall be granted by not less than two members of the board (*ib.*, s. 5).

Osteopathy — Limitations — Offence. — The certificate provided in section 5 shall not authorize the holder to prescribe or use drugs in the practice of osteopathy, for [*or?*] to perform major or operative surgery. Any person holding certificate under this act, who shall prescribe or use drugs in the practice of osteopathy, or who shall perform major, minor, or operative surgery, shall be guilty of a misdemeanor, provided that nothing in this act shall be construed to prohibit any legalized osteopath in this State from practising major or operative surgery after having passed a satisfactory examination in surgery before the State board of medical examiners of Montana (*ib.*, s. 6).

Osteopathy — Recording. — The person receiving such license shall have it recorded in the office of the county clerk in the county in which he or she resides, and the record shall be endorsed thereon. In case such licensee remove to another county to practise he shall record the license in like manner in the county into which he or she removed (*ib.*, s. 7).

Osteopathy—Offence.—Any person practising osteopathy in this State, without first having obtained a license herein provided for, or contrary to the provisions of this act, or who for the purpose of obtaining such license shall falsely represent himself or herself to be the holder of a diploma as herein provided, shall be guilty of a misdemeanor, and punishable by a fine of from $50 to $100 or by imprisonment in the county jail for not more than ninety days for each and every such offence. It shall be the duty of the respective county attorneys to prosecute violations of this act (*ib.*, s. 8).

Osteopathy—Revocation.—Any such certificate may be revoked by said board, upon satisfactory proof of fraud or mis-

representation in procuring the same, or for any violation of the provisions of this certificate, or any gross immorality by the holder thereof (*ib.*, s. 9).

OSTEOPATHY NOT THE PRACTICE OF MEDICINE.—The system, method, or science of treating diseases of the human body, commonly known as osteopathy, is not the practice of medicine or surgery within the meaning of ss. 600–608, c. 16, pt. iii., title i., of the Political Code, and s. 706, title x., of the Penal Code, and not subject to the provisions of said sections (*ib.*, s. 11).

OSTEOPATHY—FEES.—To the secretary of the board for license, when application is made for certificates under section 3, $20; provided, in case of failure of an applicant to pass a satisfactory examination, he will be entitled to a second examination without charge at the next succeeding meeting of the board (*ib.*, s. 3).

To the secretary of the board, in advance, for examination and license, under section 5, $20 (*ib.*, s. 5).

To the county clerk for recording license, the usual fee for making such record (*ib.*, s. 7).

NEBRASKA.[1]

STATE BOARD OF HEALTH.—This board consists of the governor, attorney general, and superintendent of public instruction (Act 1891, c. 35, s. 1; Comp. Stats., 1901, s. 3,684; Cobbey,[2] s. 9,416). It is made the duty of said board to see that all provisions of this act are strictly enforced,[3] to grant certificates as

[1] The act is constitutional as respects its title, though it purports to regulate the practice of medicine, and also regulates surgery and obstetrics. As popularly understood, surgery and obstetrics are each a part of the healing art, the art of medicine. In this country, as a rule, the surgeon, physician, and obstetrician are usually comprised in one and the same person, and he who practises these arts combined is popularly considered as practising medicine, no matter which one of the three arts he may at any given time be utilizing. Little *v.* State, 60 Neb., 749.

[2] By Act 1903, c. 124, p. 630, J. E. Cobbey was authorized to prepare a statute (in the nature of an annotated compilation of the public laws), to be received in all the courts of the State, as *prima facie evidence* of the law. The medical law in this authorized compilation is contained in Cobbey's Annotated Statutes (1903), Vol. II., ss. 9,417–9,433, and the osteopathic law in ss. 9,466–9,474, which sections are taken consecutively in the order of their numbers from the corresponding sections of the medical law and its amendments, and the osteopathic law, as found in the compiled statutes of 1901.

[3] The general power of the State to provide that only persons skilled in the healing of diseases shall hold

herein provided, and to cause to be prosecuted all violations of this act. The board is empowered to make and adopt all necessary rules, regulations, and by-laws not inconsistent with the Constitution and law of the State or of the United States, to enable it to perform its duties and transact its business under this act (Act 1891, c. 35, s. 5; Compiled Stats. 1901, s. 3,688; Cobbey,[1] sec. 9,420).

A majority of the board shall constitute a quorum for the transaction of business (Act 1891, c. 35, p. 282, s. 6; Comp. Stats. 1901, s. 3,689; Cobbey, s. 9,421).

The board is required to meet as often and at such times as the governor may from time to time designate (Act 1891, c. 35, p. 280, s. 2; Comp. Stats. 1901, s. 3,685; Cobbey, s. 9,417).

SECRETARIES.—The board is required to appoint four secretaries, graduated physicians of at least seven years' consecutive practice, who at the time of their appointment are actually engaged in practice in Nebraska; said appointments are required to be so made that of said secretaries two shall be physicians of the *called (sic !)* regular school, one of the so-called eclectic school, and one of the so-called homœopathic school (Act 1891, c. 35, s. 3, amd. 1897, c. 49, s. 1; Compiled Stats., 1901, s. 3,686; Cobbey, s. 9,418).

The secretaries have power, and it is their duty, to assist and advise said board in the performance of its duties, to summon witnesses, and take testimony in the same manner as witnesses are summoned and depositions taken under the code of civil procedure, and to report said testimony to the board, with their findings of fact and recommendations on all matters coming before said board requiring evidence for their determination, except as hereinafter provided (Act 1891, c. 35, p. 281, s. 4;[2] Comp. Stats. 1901, s. 3,687; Cobbey, s. 9,419).

themselves out to the public as physicians is undoubted. This power cannot be used to build up any particular school of medicine, but is designed to permit only those qualified by education and good moral character to engage in the business. No one should be permitted to practise who has not the necessary diploma, or has been in actual practice in the State for the time prescribed by statute. The board is not to use its power arbitrarily nor to refuse a certificate in a proper case, nor to attempt to build up any particular system (*ob. dict.*). Gee Wo *v.* State, 36 Neb., 241.

[1] See p. 350, n. 2.

[2] The title of the Act of 1883 (a predecessor of the present law), "An Act to Amend Section 4 of Chapter 55 of the Compiled Statutes of Nebraska," is sufficient; the law requires that the amendatory statutes shall be definite and certain as to the statute amended. This may be accomplished

QUALIFICATION.—It is unlawful [1] for any person to practise [2] medicine, surgery, or obstetrics,[3] or any of their branches, without having first applied for and obtained from the State board of health a license so to do.

Application therefor shall be in writing, accompanied by the examination fees and with proof that the applicant is of good moral character. Applications from candidates who desire to practise medicine and surgery in any or all of their branches shall be accompanied by proof that the applicant is a graduate of a medical school or college in good standing,[4] as defined in sec-

as well by designating the chapter in the Compiled Statutes as by referring to the act by its title. Dogge *v.* State, 17 Neb., 140. See note 3, p. 354.

[1] The act (so held of Acts 1881 and 1883, the predecessors of the present law) applies to all alike, the most skilful physician and the merest tyro. The evident purpose of the act is to restrict the practice of medicine and surgery to those whose education and training may reasonably be supposed to have qualified them for the business. Dogge *v.* State, 17 Neb., 140 (1885).

The statute undertakes to regulate, and is not prohibitive in its nature. Any one who has complied with the provisions may practise medicine in this State. It is prohibitive only as to those who have not been duly licensed by the State board of health to practise the art of healing. Little *v.* State, 60 Neb., 749.

It is no offence to practise medicine or to claim to be a physician unless such conduct would violate some specific prohibition of the criminal statutes of the State. Denton *v.* State, 21 Neb., 445.

By sec. 7 of the Act of 1891 it was made unlawful for any person to practise medicine, etc., without having first obtained and registered the certificate of the State board, and to enable him to obtain it, he must be a graduate of a medical college or school legally chartered and in good standing; in sec. 11 certain persons were relieved of the necessity of being graduates, but not from the necessity of obtaining a certificate and its registration; from these exactions there were no exceptions; after six months from the passage of the act, the persons designated in sec. 11 were obliged to have obtained certificates; none were exempted; therefore the exceptions in sec. 11 need not be negatived, after six months from its passage, in an information charging an offence under the act. O'Connor *v.* State, 46 Neb., 157 (overruling Gee Wo *v.* State, 36 Neb., 241), affirmed by Sofield *v.* State, 61 Neb., 600.

[2] In Golder *v.* Lund, 50 Neb., 867, the court declined to determine whether, in order to qualify a person learned in the profession, to testify as an expert he must necessarily be qualified under the act to practise medicine in the State.

The fact that a person is a graduate of a medical college and has received the degree of "Doctor of Medicine" will not authorize him to practise medicine in the State unless he register (so held of the Acts of 1881 and 1883, the predecessors of the present law). Dogge *v.* State, 17 Neb., 140 (1885).

There are two classes of persons who are prohibited from practising medicine (so held of Act 1881, p. 282, Comp. Stats. 1881, c. 55, a predecessor of the present law), those who are unregistered, and those who do not possess the qualifications required by sec. 4, whether registered or not. Denton *v.* State, 21 Neb., 445.

[3] See n. 1, p. 350.

[4] The purpose of the law is not to protect medical schools or medical practitioners from competition in business; it is a police measure designed to prevent imposition upon the afflicted, by quacks and pretenders.

tion 8 (*below*). When the application has been inspected by the board and found to comply with the foregoing provisions, the board shall notify the applicant to appear before it for examination at the time and place mentioned in such notice (Act 1903, c. 60, s. 1, amending s. 7, art. 1, c. 55; Comp. Stats. Neb., 1901; Cobbey, s. 9,422). (See Appendix, p. 695.)

EXAMINATIONS may be wholly or in part in writing by the board, and shall be of a character sufficiently strict to test the qualifications of the candidate as a practitioner. The examination of those who desire to practise medicine and surgery in any or all of their branches shall embrace those subjects and topics, a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine by reputable medical colleges in the United States. All examinations provided for in this act shall be conducted under rules and regulations prescribed by the board, which shall provide for a fair and wholly impartial method of examination. It is also provided that examinations on practice of medicine and therapeutics shall be conducted by the member or members of the board of secretaries who are of the same school of medicine as that of the applicant; and it is also provided that the State board of health may at their discretion admit without examination legally qualified medical practitioners who hold certificates to practise medicine in any State with equal requirements to those of Nebraska (*ib.*).

Lincoln Medical College *v.* Poynter, 60 Neb., 228.

A medical college, maintaining a high standard of medical education, has no standing in court to enjoin members of the State board of health, and the secretaries of the board from issuing a certificate to an applicant; it is not a sufficient interest in the subject that the college alleges that if the board issues such certificate to one who has not complied with the high standard maintained by the college, it will injure it in its business by inducing its students to withdraw and to go to other colleges maintaining lower standards; such college has no legal interest in the matter; it is not charged with enforcing the law and can not be permitted to assume that function even from motives of benevolence; it bears no commission from the State authorizing it to take up the cudgels *pro bono publico*. It is "an artificial person devoid of a tangible body, without a soul, an immune from the pains, aches, and organic troubles which can be cured or intensified by medical treatment, can look with perfect complacency upon the practice of medicine by all members of the profession, realizing that however numerous the monuments erected to the want of skill on the part of the practitioner, it can never be numbered among the victims." Lincoln Medical College *v.* Poynter, 60 Neb., 228.

The office of an injunction is to prevent action; it can not reach back and undo what has already been done. Where the decision of the board has already been made, whether right or wrong, it can not be annulled by *injunction*. Lincoln Medical College *v.* Poynter, 60 Neb., 228.

A medical school or college in good standing is defined as a medical school or college which requires a preliminary examination for admission to its courses of study in all the common branches and in Latin and the higher mathematics, which requirements shall be regularly published in all the advertisements and in each prospectus or catalogue issued by said school, and which requires for granting the degree of "M.D." attendance on at least four [1] courses of lectures of six months each, no two of said courses to be held within one year, and having a full faculty of capable professors in all the different branches of medical education, to wit: anatomy, physiology, chemistry, toxicology, pathology, hygiene, materia medica, therapeutics, obstetrics, bacteriology, medical jurisprudence, gynæcology, principles and practice of medicine and surgery, and specially requiring clinical instruction in the last two named of not less than four hours per week in each during the last two courses of lectures, *provided* the four-year clause shall not apply to degrees granted prior to August, 1898 (Act 1897, c. 49, s. 2, amd. s. 8, art. 1, ch. 55; Comp. Stats., 1895; Comp. Stats., 1901, s. 3,691; Cobbey, s. 9,423).

License.—If upon investigation of the proofs submitted to the board, and after examination as hereinbefore provided, the applicant shall be found entitled to practise, the board issues its certificate, which, or a copy, must be filed by the applicant before practising, in the office of the county clerk of the county where he or she resides, or intends to practise; such certificate or copy shall be filed by the county clerk and recorded in the "Physician's Register" [2] (Act 1903, c. 60, s. 2, amd. sec. 10 of art. 1, ch. 55; Comp. Stats., Neb., 1901; [3] Cobbey, s. 9,424).

[1] "It is, we suppose, the theory of the law that one who has, as a medical student, attended a certain number of lectures during a period of four years is a less formidable menace to the lives and health of people, who may be induced to employ him as a physician or surgeon, than is a person who has attended the same number of lectures during a period of three years." Lincoln Medical College *v.* Poynter, 60 Neb., 228.

[2] In Jones *v.* State, 49 Neb., 609, it is assumed that a licensed physician is not required to procure the registration of his certificate in every county to which he may be called in the practice of his profession, and that the demand of the statute is satisfied by registration in the county of his residence.

[3] On the efficiency and constitutionality of legislation amending the laws by reference to the Compiled Statutes instead of to the original law, see Ballou *v.* Black, 17 Neb., 389; State *v.* Breka, 20 Neb., 375; State *v.* Babcock, 23 Neb., 128; State *v.* Stewart, 52 Neb., 243.

The act gave physicians entitled to practise at the time of its enactment[1] six months in which to comply with its provisions with reference to them[2] (1891, c. 35, s. 11; Comp. Stats., 1901, s. 3,694; Cobbey, s. 9,425).

The secretaries of the board may issue certificates, without a vote of the board, when the proof upon which certificates are granted may have been on file in its office for ten days without a vote of the board, when no protest has been filed, and if in their opinion the proof complies with the act (1891, c. 35, s. 12; Comp. Stats., 1901, s. 3,695; Cobbey, s. 9,426).

When the holder of a certificate removes to another county, he must file and record it in the office of the county clerk in the county to which he removes (1891, c. 35, s. 13; Comp. Stats., 1901, s. 3,696; Cobbey, s. 9,427).

Revocation of License.—The board may refuse to issue a certificate, or may revoke one already issued, for any of the following causes: the employment of fraud or deception in applying for license or diploma or in passing the examination provided for in this act; conviction of crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics, or stimulants; unprofessional or dishonorable conduct. "Unprofessional or dishonorable conduct" means: first, the procuring or aiding or abetting in procuring a criminal abortion; second, the obtaining of a fee on the assurance that a manifestly incurable disease can be permanently cured; third, a betrayal of a professional secret to the detriment of a patient; fourth, causing the publication and circulation of advertisements of any medicine or means whereby the monthly periods of women can be regulated or the menses can be established if

[1] Under sec. 4 of the Act of 1881, p. 282, there were three qualifications, any one of which would entitle a person to registration: (1) A graduate of a legally chartered medical college or institution having authority to grant the degree of "Doctor of Medicine"; (2) a person who on June 1st, 1881, had attended one full course of lectures in a chartered medical college or institution having authority to confer the degree of Doctor of Medicine, and had practised three years, one of which was in this State; (3) a person who at the date named had been engaged in the practice of medicine, etc., for a livelihood for ten years, the last two of which were in the State. Denton *v.* State, 21 Neb., 445.

The Act of 1891 superseded the law of 1881. There are two classes of persons entitled to register, those about to begin practice in the State, and persons already engaged in practice under the Act of 1881, when the Act of 1891 took effect. Gee Wo *v.* State, 36 Neb., 241; citing and discussing State *v.* Phippin, 70 Mich., 11.

[2] See note 1, p. 352.

suppressed; fifth, causing the publication and circulation of advertisements of any kind relative to diseases of the sexual organs, tending to injure the morals of the public (Act 1903, c. 61, s. 1, amending s. 14, art. 1, c. 55; Comp. Stats. Neb. 1901;[1] Cobbey, s. 9,428).

PENALTY.—No person is entitled to recover in any court in this State[2] any sum of money for medical, surgical, or obstetrical service unless he shall have complied with the act, and is one of the persons authorized to be registered (1891, c. 35, s. 15; Comp. Stats., 1901, s. 3,698; Cobbey, s. 9,429).[3] (See p. 695.)

[1] See note 3, p. 354.

[2] The law does not declare a contract for medical services by an unlicensed practitioner void; the prohibition is limited to the practitioner himself; therefore where he negotiates a note given for medical services, the innocent holder can enforce the note against the maker; the medical act has never been construed to have the effect of invalidating negotiable paper. Citizens' State Bank *v.* Nore, 93 N. W. R., 160 (1903).

As early as 1511 Parliament passed an act requiring practitioners of surgery in London and vicinity to be examined and licensed by the College of Surgeons, and imposing a penalty for non-compliance. In Gremaire *v.* Le Clerc Bois Valon (1809), 2 Camp. 144, this ancient statute was set up as a defence to an action for surgical services, but it was held insufficient even as between the parties, and recovery was allowed. Citizens' State Bank *v.* Nore, 93 N. W. R., 160 (1903).

A petition asserting a claim against the estate of a decedent for the value of medical services sufficiently sets out that the claimant was a duly registered practitioner of medicine, if it alleges that the claimant is and was at all times mentioned in the petition (including the times at which the services were rendered) a regular practising physician; he could not have been practising lawfully without compliance with the above act, and the law raises no presumption that he practised unlawfully. When the question of license arises collaterally in a civil action between a physician and one who employs him, his qualification under the statute will be presumed and the burden is upon him who denies such license. Cather *v.* Damerell, 99 Neb., 35 (1904); citing Lacy *v.* Kossuth Co., 106 Iowa, 16; Lyford *v.* Martin (Minn.), 82 N. W. R., 479; City of Chicago *v.* Wood, 24 Ill. App., 40.

[3] The purpose of the statute was to protect the sick and afflicted against the knavery of quacks, and the construction that satisfies this statute by registration before suit brought is so foreign to the general scope of the entire act that it cannot be tolerated; accordingly it was *held* that a physician could not, after he had filed a certificate from the State board of health in the county clerk's office, institute a suit and recover for professional services rendered before the certificate was filed. Maxwell *v.* Swegart, 48 Neb., 789, distinguishing Gardner *v.* Tatum, 81 Cal., 370, to the contrary.

Although sec. 15 in express terms prohibits a recovery for medical services rendered by a person not licensed to practise under the act (citing Maxwell *v.* Swegart, 48 Neb., 789), still it does not follow that in all proceedings the burden is upon the party asserting the professional character of the physician to prove by the record his license to practise. The court discusses the rules in the different States respecting the burden of proof in criminal and civil causes, and declines to determine what would be the rule in an action for services by the physician. It says that the cases holding that in such actions a license is presumed, distinguish such actions from prosecutions, or penal

Violation of the act [1] is a misdemeanor,[2] punishable with a fine of from $50 to $300 and costs of prosecution, and a person convicted shall stand committed till the fine and costs are paid [3] (1891, c. 35, s. 16; Comp. Stats., 1901, s. 3,699; Cobbey, s. 9,430).

DEFINITION [4]—EXCEPTIONS.[5]—To operate on, profess to heal,

actions for proceeding without a license, on the ground that in the former class the issue is collateral; whether or not this reason is sound when applied to an action for services, it is certainly sound when applied to an action between third parties (such as an action in which a patient is seeking to recover damages for personal injuries caused by the negligence of another, and calls his physician as a witness to prove the value of his services in attending the patient, as an element of damage). The reason does not apply when the qualifications of the physician are involved in a proceeding to which he is not a party. Whatever may be the rule in an action by or against the physician, in an action to which he is not a party, proof that he practised as a physician raises the presumption that he was qualified to do so. Golder *v.* Lund, 50 Neb., 867; citing City of Chicago *v.* Wood, 24 Ill. App., 40; see p. 236, n. 3.

[1] The description of the qualifications necessary is not found in sec. 9 (of the former Act of 1881), which provided the punishment and defined the crime, but in sec. 4, which permitted registration; it was necessary in a complaint in a criminal prosecution for violating the law to allege that the accused engaged in the practice of medicine, etc., and that one or all of the qualifications did not exist, and this should be done substantially in the language of the statute; where this was not done the complaint did not state an offence, and a motion to quash should have been sustained. Denton *v.* State, 21 Neb., 445.

For discussion of what is necessary to allege and what to negative in an information for violation of the law, see Gee Wo *v.* State, 36 Neb., 241; overruled in O'Connor *v.* State, 46 Neb., 157 (which see).

The pleader, in an information for violating the act, should aver facts showing that the accused did one or all of the acts which by sec. 17 are stated to constitute "practising medicine"; it is not sufficient merely to charge that the accused unlawfully practised medicine. O'Connor *v.* State, 46 Neb., 157; distinguished in Sofield *v.* State, 61 Neb., 600.

On sufficiency and form of *information* for violating the law, see Jones *v.* State, 49 Neb., 609.

The amendment of the act so as to include new offences, without amending the provisions imposing a penalty, did not leave the penalty applicable only to the old offence, but extended it to apply to the new offences created by the amendment. Little *v.* State, 60 Neb., 749.

Where information for violating the law contains numerous counts, it is not necessary that the prosecuting attorney shall elect upon which he will proceed, as the offences charged are of a similar kind. Little *v.* State, 60 Neb., 749.

It is not necessary that an information, for violating the law, should state the names of the persons upon whom the accused practised the healing art, where it alleges that their names are unknown to the county attorney. Sofield *v.* State, 61 Neb., 600 (distinguishing O'Connor *v.* State, 46 Neb., 157, where the names were not stated, and it did not appear that they were unknown, and the information was held defective).

[2] See note 1, p. 352.

[3] For practice on reversal of acquittal, in Supreme Court, see State *v.* Buswell, 40 Neb., 158.

[4] The legislature had the power to define what acts would constitute the practice of medicine. Little *v.* State, 60 Neb., 749; but see State *v.* Biggs (N. C.), n. 2, p. 405 *et seq.*

[5] The legislature (in sec. 17) has excepted from the operation of the law persons belonging to any one of the classes designated in the act, and the

prescribe for, or otherwise treat any physical or mental ailment of another, is to practise medicine under this act.[1] But it does not prohibit gratuitous services in cases of emergency, nor apply

only proper inference to be drawn is that any person other than a registered physician or surgeon not embraced in such classes who shall *operate on, profess to heal or prescribe for, or otherwise treat any physical or mental ailment of another*, is, on conviction, subject to the penalties prescribed by sec. 16 (citing State *v.* Buswell, 40 Neb., 158). A person not being a registered physician, nor acting gratuitously under an emergency, nor being a commissioned surgeon in the army or navy of the United States, nor being in the occupation of a nurse, nor administering usual or ordinary household remedies, who for a remuneration treats any physical or mental ailment of another, is within the condemnation of the statute, even though he acted under the directions of a registered physician. State *v.* Paul, 56 Neb., 369. *Cf.* State *v.* Biggs (N. C.), note 2, p. 405 *et seq.*

[1] For testimony explaining the belief and practice of Christian Scientists, see State *v.* Buswell, 40 Neb., 158.

The court, by instancing Acts viii. 18–23 (Simon's effort to purchase from the apostles the power of the Holy Ghost), 2 Kings v. 20–27 (Gehazi's effort to purchase from Elisha the cure of Naaman's leprosy), and Num. xxii. *et seq.* (God's disapproval of Balaam's partly executed project of profiting by the use of the divine power with which he was endowed), concludes that the art of healing for compensation, whether exacted as a fee or expected as a gratuity, can not be classed as an act of worship, nor as the performance of a religious duty; the court therefore determined that a *Christian Scientist* who practised the art of healing, according to the tenets of his faith, for compensation, was engaged in treating physical ailments of others for compensation; that he was within none of the exceptions provided by the statute; that the statute did not merely prohibit the practice of medicine, surgery, or obstetrics as generally or usually understood; that its object was to protect the afflicted from the pretensions of the ignorant and avaricious, and its provisions are not limited to those who attempt to follow beaten paths and established usages; and its provisions should be rendered effective against pretensions based on ignorance on the one hand and credulity on the other; that the statute does not merely give a new definition to language having already a given and fixed meaning; it rather creates a new class of offences in clear and unambiguous language, which should be interpreted and enforced according to its terms. Under the indictment the sole question was whether or not the defendant had operated on, or professed to heal, or prescribed for or otherwise treated any physical or mental ailment of another; there was involved no question of sentiment nor of religious practice or duty; if the defendant was guilty as charged, neither pretense of worship nor of the performance of any other duty should have exonerated him from the punishment which an infraction of the statute involved. It was accordingly also held that the act in its application to *Christian Scientists* does not violate those provisions of the State Constitution (art. 1, sec. 4) and of the enabling act (sec. 4), which respectively provide that all persons have the natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, and that perfect toleration of religious sentiment shall be secured and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship. State *v.* Buswell, 40 Neb., 158; 58 N. W. R., 728; said in 24 L. R. A., 68, to be the first decision on the right of a Christian Scientist to heal the sick without a license as a physician; cited in People *v.* Gordon, 194 Ill., at 570, see p. 238, n. 1. *Cf.* State *v.* Biggs (N. C.), note 2, p. 405 *et seq.*

The representation, claiming, or

to commissioned surgeons in the United States army or navy, nor to nurses in their legal occupation, nor to the administration of ordinary household remedies (1891, c. 35, s. 17; Comp. Stats., 1901, s. 3,700; Cobbey, s. 9,431).

ITINERANT VENDER.—To be an itinerant vender of any drug, nostrum, ointment, or appliance for the treatment of disease or injury, or for such a one to publicly profess to cure or to treat disease or injury or deformity by any drug, nostrum, manipulation, or other expedient, is a misdemeanor punishable with a fine of from $50 to $100, or imprisonment in the county jail from thirty days to three months, or both, for each offence (1891, c. 35, s. 18; Comp. Stats., 1901, s. 3,701; Cobbey, s. 9,432).

FEES.—To the board of secretaries from holder of diploma from recognized medical college within Nebraska for examination and certificate, prior to examination, $10.

All other persons making such application shall pay to the said board $25.

To each of the secretaries of the board of health, for taking testimony, same fees as a notary public is allowed for similar services (Act 1903, c. 60, s. 3, amd. 9, sec. 19, art. 1, c. 55; Comp. Stats., Neb. 1901;[1] Cobbey, s. 9,433).

To county clerk, for recording, usual register's fees for recording conveyances (Act 1903, c. 60, s. 2, amd. sec. 10, Art. 1, c. 55; Comp. Stats. Neb., 1901; Cobbey, s. 9,424).

OSTEOPATHY[2]—QUALIFICATIONS.—Any person holding a di-

advertising, by the accused, that he is a regular, legal, or competent practitioner of medicine is not an essential element of the offence; he may violate the law, without so representing, claiming, or advertising himself; so held where the accused not being a registered practitioner had assisted a registered physician and under and by his direction, and sharing his remuneration. State *v.* Paul, 56 Neb., 369.

Those who practise *osteopathy* for compensation come within the purview of the statute as clearly as those who practise *Christian Science* (citing State *v.* Buswell, 40 Neb., 158); all physicians have the same object in view, restoring the patient to sound bodily or mental condition, and whether they profess to attack the malady or its cause, they are *treating the ailment*, as the word is popularly understood. The practice of osteopathy falls within the medical practice statutes (so held before the passage of the present osteopathy law). Little *v.* State, 60 Neb., 749 (1900); citing Eastman *v.* People, 71 Ill. App., 236.

[1] See note 3, p. 354.

[2] The practice of osteopathy consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the body and flexing and manipulating the limbs of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble. Little *v.* State, 60 Neb., 749.

ploma from a school or college of osteopathy in good standing as defined in section 9,467 of Cobbey's Annotated Statutes, 1903, shall, upon presentation of such diploma to the State board of health and satisfying such board by affidavit that he or she is the legal holder thereof, and passing an examination before the said board in any or all of the following named subjects, to wit: anatomy, physiology, physiological chemistry, toxicology, histology, *hygene (sic!)*, pathology, symptomatology, physical diagnosis, obstetrics, gynecology, surgery, practice and principles of osteopathy and osteopathic therapeutics, medical jurispudence, be granted by such board a certificate permitting such person to practise osteopathy in the State, on payment to the board of a fee of $25, and presenting evidence of a good moral character, which certificate shall be recorded by the county clerk of the county in which the holder desires to practise (Act 1905, s. 1 amdg. s. 9,466, Cobbey's Ann. Stats., 1903).[1]

Osteopathy—Definition.—The term school or college of osteopathy in good standing is defined as follows: a legally chartered osteopathy school or college requiring before admission to its course of study a preliminary examination in all the common branches, and Latin, and, further, requiring as requisite for the degree of diplomate or doctor of osteopathy an actual attendance at such osteopathic school or college of at least twenty months or four terms of five months each, and after 1906 at least twenty-seven months or three terms of nine months each, its course of study to include anatomy, physiology, physiological chemistry, toxicology, histology, *hygene (sic!)*, pathology, symptomatology, physical diagnosis, obstetrics, *gynecology (sic!)*, medical jurisprudence, osteopathic therapeutics, and theory and practice of osteopathy, and especially requiring clinical instruction in the principles and practice of osteopathy of not less than four hours per week in the last year of its course, and having a full faculty of professors to teach the studies of its course. The foregoing requirements shall be regularly published in each prospectus or catalogue of such osteopathic school or college (Act 1905, s. 2, amdg. s. 9,467, Cobbey's Ann. Stats., 1903).[1]

Osteopathy—Limitations.—The certificate provided for in section 1 shall not authorize the holder to prescribe or use drugs in his or her practice, nor to perform operative surgery (Act 1901, s. 3; Comp. Stats. 1901, s. 3,702, *c;* Cobbey, s. 9,468).

[1] See Appendix, p. 695.

OSTEOPATHY—REVOCATION.—The board may revoke certificates of persons guilty of unprofessional or dishonorable conduct, provided always they have given the person an opportunity to be heard in his or her defence (*ib.*, s. 4; Comp. Stats. 1901, s. 3,702, *d*; Cobbey, s. 9,469).

OSTEOPATHY—OFFENCE.—Any person who for the purpose of securing the certificate named in section 1 shall falsely represent himself or herself to be the legal holder of any such diploma, shall be guilty of perjury and punished as provided for perjury (*ib.*, s. 5; Comp. Stats. 1901, s. 3,702, *e*; Cobbey, s. 9,470).

Any person not possessing the qualifications for the practice of osteopathy required by this act, or any person who has not complied with this act, who shall engage in the practice of osteopathy in the State, shall be guilty of a misdemeanor, and fined from $50 to $500 and costs of prosecution for each offence, and stand committed till fine and costs are paid (*ib.*, s. 6; Comp. Stats. 1901, s. 3,702, *f*; Cobbey, s. 9,471).

OSTEOPATHY—EXCEPTIONS.—Nothing in this act prohibits gratuitous services in case of emergency, and this act does not apply to physicians or surgeons regularly registered in the State or to United States army or navy surgeons (*ib.*, s. 7; Comp. Stats. 1901, c. 3,702, *g*; Cobbey, s. 9,472).

OSTEOPATHY—LAWS APPLICABLE.—All laws, rules, or regulations now in force in the State or which shall hereafter be enacted, for the purpose of regulating the reporting of contagious diseases, deaths, or births, to the proper authorities, and to which the registered practitioner of medicine is subject, shall apply equally to the registered practitioner of osteopathy (*ib.*, s. 8; Comp. Stats. 1901, c. 3,702, *h*; Cobbey, s. 9,473).

OSTEOPATHY NOT THE PRACTICE OF MEDICINE, ETC.[1]—The system, method, or science of treating diseases of the human body, commonly known as osteopathy, is not the practice of medicine, surgery, or obstetrics within the meaning of ss. 17 and 18, art. i., c. 55, Comp. Stats. of Neb., 1899, entitled medicine[2] (*ib.*, s. 9; Comp. Stats. 1901, c. 3,702, *i*; Cobbey, s. 9,474).

OSTEOPATHY—FEES.—To the board, on receipt of certificate

[1] See n. 2, p. 359.

[2] The Nebraska statutes have been again compiled (1901), but secs. 17 and 18 of Art. I. of c. 55 remain the same; see note 2, p. 350.

$25 (Act 1905, c. 95, s. 1 amdg. s. 9,466 of Cobbey's Ann. Stats., 1903). To the county clerk for recording certificate $1 (*ib.*).

Nevada.

State Board of Medical Examiners.—This board consists of five practising physicians, appointed by the governor, each a reputable practising physician, duly licensed as such by some legally chartered medical institution in the United States, who shall have been actually engaged in the practice of medicine in the State. Three shall be from the school of medicine known as "regular" physicians, one from the school known as "homœopathic," one from the school known as "eclectic." The board shall be selected without regard to their individual political beliefs (Act 1905, c. 63, s. 2). Each member must take the constitutional oath, and also make oath that he is a graduate in medicine and a legally qualified practitioner of medicine in this State (*ib.*, s. 3). The board shall meet twice in each year, on the first Monday of May and November, at such time and place as shall be most convenient to the board; due notice of all special meetings shall be given by publication in three papers twice a week for two weeks preceding (*ib.*, s. 4). The board may make rules to carry this law into effect. Any member may administer oaths in all matters pertaining to the duties of the board; the board may take evidence as to any matter cognizable by it. The board shall receive through their secretary applications for certificates (*ib.*, s. 5).

Restriction.—It is unlawful to practise medicine, surgery, or obstetrics without first obtaining a license as provided in this act (*ib.*, s. 1).

License without Examination.—The board may in its discretion accept and register, on payment of the registration fee, and without examination of the applicant, any certificate which shall have been issued to him by the medical examining board of the District of Columbia or of any State or Territory of the United States, provided that the legal requirements of such medical examining board shall have been at the time of issuing such certificate in no degree or particular less than those of Nevada at the time when such certificate shall be presented for registration to the board, and provided that these provisions apply only

to such of said medical examining boards as accept and register the certificates granted by this board without examination by them of the ones holding such certificates (*ib.*, s. 6).

QUALIFICATION.[1]—Any person desiring to practise medicine,

[1] The law (so held of law 1875, c. 47) is not arbitrary in its exceptions or discriminations. Experience in the treatment of disease or injuries is in itself a sort of qualification for the practice of medicine or surgery; and it is within the province of the legislature to declare the minimum amount of experience that shall authorize a license to practise. Wherever the line is drawn it must be in one sense arbitrary, for there will be no appreciable difference between those who are barely included and those who are barely excluded; but the class admitted to practise will, by such a rule, as a whole, possess qualifications superior to those who are excluded. Exactly the same objection could be made to the rule which makes graduation and the possession of a diploma the test of ability. The unfairness of its operation in individual instances is an evil incident to the generality of the rule. It may have been considered that physicians and surgeons who are versed in the science upon which the intelligent practice of the art depends are always graduates, and that those who are not graduates and whose qualifications depend mainly on their individual experiences, while they may be reasonably safe advisers in the locality and among the diseases they are accustomed to, might be very unsafe advisers in another locality and climate, among a population mainly employed in other avocations, and where, as a consequence, different diseases prevail, and the same diseases may be modified by different surrounding circumstances, not only in their development but even in their earliest stages; hence there is no arbitrary discrimination in distinguishing between those who have practised ten years in the State and those who have practised ten years elsewhere (see also this opinion for a discussion of the reason why it is no unjust discrimination to admit graduates who have not practised, and to admit non-graduates, only after they have practised ten years in the State). The legislature having the power to discriminate, had full discretion, so far as the State Constitution is concerned, to discriminate upon any principle which will serve as the basis of a general classification. (See also this opinion for illustration of other cases, where local experience is a basis of qualification.) *Ex parte* Spinney, 10 Nev., 323.

In order to decide whether a rule is arbitrary or not, it must first be decided whether it subserves a good public policy or not, and that is a question for the legislature and not for the courts. (See this opinion for a lengthy discussion of the proposition that courts have not the power to curb absurd legislation, merely because it is absurd, and by way of illustration saying that the court would not have the power to pronounce unconstitutional as special legislation a law prohibiting men from practising medicine if they had red hair (per Beatty, J.). (*Contra* on this illustrative proposition Hawley, C. J.) *Ex parte* Spinney, 10 Nev., 323, *cf. supra*, p. 310.

The provision of the Constitution of the United States securing to citizens of other States the privileges and immunities of citizens in each State, amounts to no more than that citizens of other States are entitled to practise medicine and surgery here on precisely the same terms and subject only to the same restrictions as our own citizens. This law makes no distinction in terms between our own citizens and citizens of other States. *Ibid.*

It does not make a law unconstitutional, that it requires a qualification which none but citizens of the State can possess, if it is reasonable and tends to subserve public interests. *Ib.* (see this opinion for discussion of the power of courts under the equal privilege and immunity clauses of the federal Constitution).

Amongst the inherent privileges of

surgery, or obstetrics, or any of the various branches of medicine shall, before beginning to practise, procure from the State Board of Medical Examiners a certificate that such person is entitled to practise medicine, surgery, or obstetrics in this State (*ib.*, s. 7). The applicant must submit to the board his or her diploma, issued by some legally chartered medical school, whose requirements at the time of granting such diploma shall have been in no particular less than those prescribed by the Association of American Medical Colleges for that year, and must accompany said diploma or license with an affidavit setting forth the number and duration of terms the applicant was required to be in attendance, and that he is the lawful possessor of the same, that he is the person therein named, and that the diploma or license was procured without fraud or misrepresentation of any kind (*ib.*). Such application shall be accompanied by the affidavit of two freeholders, resident in the same county in which the applicant resides, stating that the applicant is the identical person named in the accompanying diploma, and that he or she is of good moral standing and reputable. In addition to such affidavit, the board may hear such further evidence as in its discretion it may deem proper as to any of the matters embraced in said affidavit (*ib.*). If it should appear from such evidence that said affidavit is untrue in any particular, or if it should appear that the applicant is not of good moral character, the application must be rejected (*ib.*). The board shall retain the diploma such time as is necessary, but in no case shall it retain it to exceed two weeks. All such diplomas and affidavits shall be addressed to the secretary of the board (*ib.*).

Applicants for certificates to practise medicine, surgery, or

the citizens of a free country is the right to pursue a lawful calling in a lawful manner, that is subject to such restrictions and none other, as may be deemed necessary for the public welfare; it is the province of the legislature to decide what restrictions are necessary in that view, and its decision, no matter how ill-advised it may appear to be, is binding on the courts whenever it appears to have been based upon motives of policy or general expediency. *Ibid.*

The law (a former law of 1875, c. 47) is unconstitutional in requiring ten years' practice *immediately preceding* its enactment, as a qualification, because to that extent it is arbitrary, but the remainder of the law violates neither State nor federal Constitution and is valid (per Beatty, J., in *ex parte* Spinney, 10 Nev., 323).

The real test under this law is based on medical skill and knowledge. In adopting the exception of physicians ten years in practice, the legislature violated no provision of the federal or State constitutions (per Hawley, C. J., in *ex parte* Spinney, 10 Nev., 323).

obstetrics, other than those noted above, shall present a diploma from a legally recognized college, and pass a satisfactory examination before the State Board of Medical Examiners as to his or her qualifications. The applicant must appear personally before the board. The examination shall be in English, wholly or partly in writing. In each branch the applicant shall obtain seventy-five per cent.

EXAMINATIONS shall be in the following: anatomy, physiology, materia medica and therapeutics, chemistry, bacteriology, pathology, toxicology, obstetrics, surgery, general medicine, diseases of the skin, eye, ear, nose, brain, and the genito-urinary system. The examinations shall be fair and impartial and the questions of such a character as will determine the fitness of the applicant to practise his or her profession. When an applicant applies for examination in materia medica and therapeutics, and theory and practice of medicine, he shall designate in what school of medicine he desires to practise; and only the member or members of the board who belong to the school so designated shall participate in this part of the examination.

Examinations shall be practical in character and designed to discover the applicant's fitness to practise medicine and surgery. If an applicant fail in his first examination, he may after not less than six months be reëxamined without additional fee. If he fail in a second examination, he shall not thereafter be entitled to another examination in less than one year after the second examination, and shall pay the full fee. The examination papers form a part of the records of the board, kept on file by the secretary and open to public inspection whenever requested after the examination (*ib.*, s. 8).

APPEAL.—An unsuccessful applicant may appeal to the courts, requiring the said board to show cause why he should not be permitted to practise medicine, surgery, or obstetrics in the State (*ib.*, s. 9).

RECORD.—The board must keep a record of the names of all persons to whom it issues certificates, showing the names of applicants, the name of the school granting the diploma, its date, the number of terms the applicant attended school, his residence and the date of issuance of certificate. The secretary must note the unsuccessful applicants, furnishing the same information as above. The secretary must furnish to each county clerk a com-

plete list of persons to whom certificates have been issued, after each meeting of the board, showing name, age, and location of the holder of each certificate, the name of the institution conferring the degree, and the date of issuance of the certificate (*ib.*, s. 11).

Recording.—The certificate must be recorded in the office of the county recorder of the county in which the person to whom it has been issued desires to practise.

Refusal—Revocation.—The board may refuse a certificate to any applicant guilty of unprofessional conduct, and may revoke any certificate for a like cause; the aggrieved party may appeal to the courts. Unprofessional conduct is defined (*ib.*, s. 12) in the law (see Appendix, p. 695).

Definition.—The words practice of medicine, surgery, and obstetrics mean to open an office for such purpose, or to announce to the public or to any individual in any way a desire or willingness or readiness to treat the sick or afflicted in any county of the State of Nevada, or to investigate or diagnosticate, or to offer to investigate or diagnosticate, any physical or mental ailment or disease of any person, or to give surgical assistance to, or to suggest, recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury or deformity, after having received, or with the intent of receiving, therefor, either directly or indirectly, any money, gift, or any other form of compensation. It is also regarded as practising medicine for any one to use in connection with his or her name the words or letters Dr., Doctor, Professor, M.D., or Healer, or any other title, word, letter, or other designation intended to imply or designate him or her as a practitioner of medicine or surgery or obstetrics in any of its branches; *provided*, that nothing in the act shall be construed to prohibit gratuitous services of druggists or other persons in cases of emergency, or the domestic administration of family remedies; nor shall the act apply to commissioned surgeons of the United States army or navy in the discharge of their official duties, nor to professional or other nurses in the discharge of their duties as nurses, nor to physicians called into this State for consultation and who are legally qualified to practise in the State where he or she resides (*ib.*, s. 13).

COMPLAINT.—In charging any person in an affidavit, information, or indictment with a violation of this act by practising medicine, surgery, or obstetrics without a license, it is sufficient to charge that he or she did upon a certain day and in a certain county of the State engage in the practice of medicine, he or she not having a license to do so, without averring any further or more particular facts concerning the same (*ib.*, s. 13).

OFFENCE—PENALTY.—Practising medicine, surgery, or obstetrics without complying with this act is a misdemeanor, punishable with a fine of not less than $100, nor more than $200, or imprisonment in the county jail from fifty days to one hundred and eighty days, or both fine and imprisonment for each offence (*ib.*, s. 14).

Filing for record or attempting to file for record a certificate issued to another, falsely claiming himself to be the person named in such certificate or falsely claiming to be the person entitled to the same, is a felony punishable by imprisonment in the State prison from one to five years (sec. 15). Assuming to act as a member of the State Board of Medical Examiners, or signing or subscribing, or issuing or causing to be issued, or sealing or causing to be sealed, a certificate authorizing any person to practise medicine or surgery in the State, except the person so acting and doing shall have been appointed a member of said board as in this act provided, is a misdemeanor punishable by a fine of from $100 to $500, or imprisonment in the county jail from sixty to one hundred and eighty days, or by both fine and imprisonment (*ib.*, s. 16).

PROSECUTIONS.—Any person may institute proceedings at law provided for in this act (*ib.*, s. 14).

FORMER PRACTITIONERS.—The law provided for submission for registration of the diplomas of those practising medicine, surgery, or obstetrics in the State on the first Monday of May, 1905. Persons who were practising prior to the passage of the act of March 15, 1899, and had not complied with that act, were required to submit their diplomas to the board on the first Monday of May, 1905.

All persons who had complied with the act of March 15, 1899, were entitled to full registration, and the secretary was required to enter free of charge on the record-book of the board

the names of all persons who complied with the act of March 15, 1899 (*ib.*, s. 17).

Reciprocal Registration.—A certificate of registration or license issued by the proper examining board of any State which agrees on reciprocal registration with this State, may be accepted as evidence of qualification for reciprocal registration in this State, provided its holder was at the time of registration the legal possessor of a diploma issued by a medical college in good standing in this State, and its date prior to the passage of this act (approved March 4, 1905, to take effect May 3, 1905) (*ib.*, s. 17).

Fee.—To be paid to secretary $25 when the diploma and affidavit is filed with him. The fee is not to be returned in case of failure to pass a satisfactory examination. A person receiving a license on the ground of reciprocity with other States and without examination, shall pay $25 for such license (*ib.*, s. 8).

From practitioners prior to the first Monday of May, 1905, registered under sec. 17, $25 (*ib.*, s. 17). From those required by sec. 17 to submit diplomas on the first Monday of May, 1905, $5 (*ib.*, s. 17).

To the county recorder the usual fee for recording (*ib.*, s. 12).

Optometry.—There is a law regulating the practice of optometry, or optical profession (1903, c. 48), but it is not within the scope of this article. It provides (sec. 4) that nothing in the act shall be construed as applying to regularly qualified medical practitioners.

New Hampshire.[1]

Qualification.—No person shall hold himself out to the

[1] It is within the power of the legislature to secure essential knowledge and skill from practitioners of medicine and surgery by the enactment of such *reasonable conditions* as are calculated to exclude from practice those unfitted therefor. State *v.* Hinman, 65 N. H., 103 (citing Hewitt *v.* Charier, 16 Pick, 353; State *v.* State Med. Bd., 32 Minn., 324; Eastman *v.* State, 109 Ind., 278). In this case, illustrating the meaning *reasonable conditions*, it was held that the dental law was unconstitutional, as operating unequally upon persons pursuing the same profession under the same circumstances; that a statute could not be constitutional which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt; that the dental statute in question, which exempted from a license fee all persons who had maintained their present residence since January 1st, 1875, was unconstitutional, because this provision was arbitrary, and had no reference

public as a physician and surgeon,[1] or advertise as such, or use the title M.D. or Dr. (or any title which shall show or tend to show that he is a practitioner of any of the branches of medicine), unless registered and authorized, or licensed and registered;[2] nor if his authority to practise is suspended or revoked

to skill, learning, or fitness; that the statute also discriminated against citizens of other States because it required such citizens, though they had maintained their residence in the same place in the other State for the same time, to pay the required license fee. The law was held unconstitutional because it imposed the license fee upon certain persons and exempted others of the same class and profession under similar circumstances and conditions. *Cf. contra* 112 Iowa, 466, *supra*, p. 259, n. 1; 10 Nev., 323, *supra*, p. 363, n. 1.

In State *v.* Pennoyer, 65 N. H., 113 (1889), 5 L. R. A., 709, the former law (Gen. Laws, c. 132, ss. 1, 2, 6–8), in effect January 1st, 1879, was held unconstitutional, by reason of its provision exempting from the license fee all persons who had resided and practised their profession at their present residence since January 1st, 1875; on the ground that, of those physicians who are declared, or found, qualified to practise, some are and some are not subjected to the burden of obtaining a license, the test being not merit, but unchanged residence, and that this was an arbitrary discrimination, without regard to competency or material difference in situation. The court said: "If any inequality were permissible, the discrimination might be made prohibitory and a monopoly of the business given to physicians who have resided in a town or city for a specified time."

In Hart *v.* Folsom, 70 N. H., 213, the court did not consider the constitutionality of the Act of 1899, because the plaintiff had attempted to avail himself of its provisions by mandamus, and was therefore not in a position to question its validity.

In Challis *v.* Lake, 71 N. H., 90, the court again declined to consider the constitutionality of the present law on the ground that it was immaterial in that case.

[1] A practitioner of medicine and surgery is a physician and surgeon who habitually holds himself out for the practice of the profession. Hart *v.* Folsom, 70 N. H., 213, citing State *v.* Bryan, 98 N. C., 644.

The purpose of the act was to prevent ignorant persons from administering drugs and trifling with the public health. Hart *v.* Folsom, 70 N. H., 213.

The evident purpose of the statute was to prevent incompetent persons from practising medicine and imposing upon the credulity of their unsuspecting patients. Challis *v.* Lake, 71 N. H., 90.

It is within the legitimate range of cross-examination of a physician testifying as an expert to show that he has not a license, obtained after an examination as to his medical knowledge; the fact, if unexplained, would afford ground for the argument that his testimony as to his qualifications was entitled to little weight. Challis *v.* Lake, 71 N. H., 90.

On the value of the testimony of an expert witness who has not obtained a license under the law, and that in such a case the question whether the law is unconstitutional or not, is immaterial. See Challis *v.* Lake, 71 N. H., 90.

[2] Under General Laws, c. 132, s. 2 (which preceded the present Act of 1897), it was held that two classes of persons were mentioned to whom a license might be issued: those who have and those who have not received a diploma from a medical school authorized to confer degrees; to the former class without examination, to the latter upon examination; that authority to examine and license, under the statute, meant authority to license, when upon examination of the candidate as to his medical education, skill, and experience, the censors should be satisfied that he possessed the necessary qualifications for the

by the regent of a State board [1] (Act 1897, c. 63, sec. 1, Chase's Pub. Stats., N. H., 1901, p. 426). (See Appendix, p. 696.)

Board of Medical Examiners.—The governor and council appoint three separate State boards of medical examiners, of five members each; one representing the New Hampshire Medical Society, one the New Hampshire Homœopathic Medical Society, one the New Hampshire Eclectic Society. The selections of members are from nominations by the respective societies; the respective nominees must furnish to the governor and council satisfactory proof that they have received the degree of doctor of medicine from some registered medical school, and have legally practised medicine in the State at least five years (*ib.*, s. 2). The superintendent of public instruction is regent of the boards (*ib.*, s. 4). At any meeting a majority constitutes a quorum, but questions prepared by the boards may be grouped and edited, or answer papers of candidates may be examined and marked by committees authorized by the boards (*ib.*, s. 6).

occupation of a medical practitioner; but when the candidate had received a diploma from a medical school he had only to satisfy the board that it was conferred by a school authorized to confer degrees in medicine and surgery, and that it was conferred after he had pursued the prescribed course of study, and upon due examination by the authorities of the school; that the statute made such a diploma conclusive evidence to the censors that he possessed the requisite medical qualifications to practise medicine, surgery, and midwifery, and hence the provision that he should receive a license without examination, *i.e.*, as to his medical qualifications; that the license is in effect a certificate that the holder possesses the necessary medical and other qualifications; that the license might be revoked when it was improperly obtained, or when the holder had, by conviction for crime, or from any other cause, ceased to be worthy of public confidence; that character, no less than medical education, skill, and experience, was within the meaning of the statute a qualification for a competent physician or surgeon, and that one who does not possess the requisite qualifications cannot be worthy of public confidence (citing Barrows *v.* Mass. Med. Soc., 12 Cush 402, 409; Rex *v.* Dr. Askew, etc., 4 Burr, 2,186, 2,189; Com. *v.* Philanthropic Soc., 5 Burr. 486). But that a license once granted could not be revoked except upon due notice and hearing, and an opportunity to meet charges and evidence; and for the same reasons an applicant for a license who possessed the requisite medical qualications should not be denied a license without a hearing on the question whether he was in other respects worthy of public confidence; that the statute did not authorize the exclusion of the applicant for a license, from the rights of a licensed physician, without trial; that an examination to ascertain his medical and surgical knowledge and skill was rendered unnecessary by his diploma, the board being satisfied that he obtained his diploma after pursuing the prescribed course of study and upon due examination; but the statute did not require the issue of a license which should be immediately revoked for want of other qualifications than medical and surgical knowledge and skill. Gage *v.* Censors, 63 N. H., 92 (1884).

[1] See n. 2, p. 369.

EXAMINATIONS.[1]—The regent admits to examination a candidate who pays $10 and submits satisfactory evidence, verified by oath if required, that he is (i.) more than twenty-one years old, (ii.) of good moral character,[1] (iii.) a graduate from a registered college, or has satisfactorily completed a full course in a registered academy or high school, or a preliminary education considered and accepted by the regent as fully equivalent; (iv.) has studied medicine not less than four full school years of at least nine months each, including four satisfactory courses of at least six months each, in four different calendar years, in a medical college registered as maintaining at the time a satisfactory standard; the regent shall accept as equivalent for any part of the third and fourth requirements, evidence of five or more years' reputable practice, provided such substitution be specified in the license, and as the equivalent of the first year of the fourth requirement, evidence of graduation from a registered college course; *providing* that such college course shall have included not less than the minimum requirements for such admission to the second year of a medical school registered as maintaining at the time a satisfactory standard; (v.) has received the degree of bachelor or doctor of medicine from some registered medical school, or a diploma or license conferring full right to practise medicine in some foreign country. Students who matriculated in a New Hampshire medical school before January 1st, 1898, on the prescribed study of medicine, are exempt from this preliminary education requirement (*ib.*, s. 7, as amd. Act 1903, c. 115, s. 1). Each board submits to the regent, as required, lists of suitable questions for thorough examinations in anatomy, physiology and hygiene, chemistry, surgery, obstetrics, pathology and diagnosis, and therapeutics, including practice and materia medica; all questions submitted to any candidate shall be chosen from those prepared by the board selected by that candidate, and shall be in harmony with the tenets of that school as determined by its State board of medical examiners (*ib.*, s. 8). Examinations shall be given at Concord at least twice annually, exclusively in writing and in English. Each examination shall be conducted by the regent or a competent examiner appointed by him, who shall not be one of the medical examiners; the question and answer papers shall be delivered by the regent or examiner in charge to

[1] See n. 2, p. 369.

the board selected by each candidate, or its authorized committee, and such board, without unnecessary delay, shall examine and mark the answers and transmit to the regent a report stating the standing of each candidate in each branch, his general average, and whether the board recommends that a license be granted. Such report shall include the questions and answers, and shall be filed in the public records of the regent. A candidate failing on the first examination may, after not less than six months' further study, have a second examination without fee; if the failure is from illness or other cause satisfactory to the boards, they may waive the required six months' study (*ib.*, s. 9).

LICENSE.[1]—On receiving a report that an applicant has passed and is recommended for license, the regent shall issue to him a license to practise medicine.[2] Applicants examined and licensed by other State examining boards registered by the regent as maintaining standards not lower than those provided by this chapter, and applicants who matriculated in a New Hampshire medical school before January 1st, 1898, and who received the degree M. D. January 1st, 1903, may without further examination, on payment of $5 to the regent and on submitting such evidence as may be required, receive an indorsement of their licenses or diplomas, conferring all rights and privileges of a regent license issued after examination. Licenses before they are issued are numbered and recorded in a book kept in the regent's office, and the number noted in the license; the record is open to public inspection, and in all legal proceedings shall have the same weight as evidence, as a record of conveyance of land (*ib.*, s. 10).

EXCEPTIONS.—This chapter does not affect commissioned

[1] See n. 2, p. 369.

[2] Under the former law it was held that a license may be refused, if on other grounds than want of knowledge or skill, the applicant, upon due notice and hearing, is fairly proved to be unworthy of public confidence, where, after such notice and hearing, the same license might be revoked on the same ground. Gage *v.* Censors, 63 N. H., 92.

An applicant for a license is entitled to a hearing before the board before a license is refused on the ground that he is unworthy of public confidence, if, in conformity with the law, he produces conclusive evidence of his medical and surgical knowledge and skill. Gage *v.* Censors, 63 N. H., 92.

On application for a mandamus to compel the issue of a license, where it appeared that the board had not given the applicant a hearing to which he was entitled, the court, in Gage *v.* Censors, 63 N. H., 92 (1884), directed that the board give him a hearing, at which it might be proved before the board whether or not he was unworthy of public confidence, and suspended further proceedings in the mandamus case, to await the result of a speedy trial of this fact before the board. See note 2, p. 374.

medical officers serving in the United States army, navy, or marine hospital service while so commissioned, or any one while actually serving on the resident medical staff of any legally incorporated hospital, or any legally registered dentist exclusively engaged in practising dentistry; or any manufacturer of artificial eyes, limbs, or orthopedic instruments or trusses, in fitting such instruments on persons in need thereof; or any lawfully qualified physician in other States or countries meeting legally registered physicians in this State in consultation; or any physician residing on a border of a neighboring State and duly authorized under the laws thereof to practise medicine therein, whose practice extends into this State, and who does not open an office or appoint a place to meet patients or receive calls within the State, or to the regular or family physicians of persons not residents of this State, when called to attend them during a temporary stay in the State[1]; nor shall it apply to clairvoyants or to persons practising hypnotism, magnetic healing, mind cure, massage, Christian science so called, or any other method of healing, if no drugs are employed or surgical operations performed; provided such persons do not violate any of the provisions of this act in relation to the use of M.D. or the title of doctor or physician (*ib.*, s. 11, as amd. 1903, c. 1).

Offence—Penalty.—Any person, not lawfully authorized and registered, who holds himself out to the public as a physician and surgeon, or advertises as such, within the State, without lawful registration or in violation of any provision of this chapter; and any person who shall buy, sell, or fraudulently obtain any medical diploma, license, record, or registration, or who shall aid or abet the same, or who shall practise medicine under cover of any medical diploma, license, record, or registration illegally obtained, or signed or issued unlawfully or under fraudulent representations or mistake of fact in a material regard; and any person who shall append the letters M.D. to his or her name; or shall assume or advertise the title of doctor (or any title which shall show or tend to show that the person assuming or advertising the same is a practitioner of any of the branches of medicine) in such a manner as to convey the impression that

[1] The following words: "Or to the hotel physician regularly employed by the landlord of a summer hotel in the care of his guests or employees" were stricken out by Act 1903, c. 1.

he or she is a legal practitioner of medicine or of any of its branches, without having legally received the medical degree or without having received a license which constituted at the time an authority to practise medicine under the laws of this State then in force, shall be guilty of a misdemeanor and shall be punishable with a fine of not more than $100 or imprisonment for three months for the first offence; and for any subsequent offence, a fine of not more than $250, or imprisonment for not less than six months, or both fine and imprisonment (*ib.*, s. 12).

Former Practitioners.—Every practitioner of medicine and surgery in the State prior to the passage of the act [March 16th, 1897] shall be, on satisfactory proof to the regent and payment of $1, entitled to registration [1]; and the regent shall issue a certificate signed by himself and the chairman and secretary of such board of medical examiners as the applicant may elect, which shall state the facts and the cause of said registration, and shall entitle the said person to practise medicine legally in the State (*ib.*, s. 13).[2]

Fees.—To regent, on examination, $10 (*ib.*, s. 7).

[1] See n. 2, p. 369.

[2] Only those physicians and surgeons who were in practice in this State when the act was passed are entitled to registration under sec. 13. Hart *v.* Folsom, 70 N. H., 213 (1899).

The fact that an applicant is a physician and surgeon in practice at the time [*i.e.*, of the passage of the act] seems to have been deemed by the legislature as sufficient evidence that he had pursued the requisite course of training and possessed a reasonable degree of skill in the profession. Hart *v.* Folsom, 70 N. H., 213.

It is the duty of the regent to issue a license to each applicant who comes within the provisions of the act. Whenever application is made under sec. 13, the regent must determine (1) whether the applicant is a physician and surgeon, and (2) whether he was engaged in practice when the act was passed. In performing this duty he acts in a judicial capacity, and is bound to receive and consider all evidence that legally bears upon the questions. If, for any reason, the applicant is unable to furnish such certificate as the regent may require, the fact does not conclusively show that the applicant does not possess the necessary qualifications. The regent should consider all competent evidence offered, and, if satisfied that the applicant comes within the provisions of sec. 13, should issue to him a license. Hart *v.* Folsom, 70 N. H., 213.

In Hart *v.* Folsom, 70 N. H., 213, where it appeared that the regent had prescribed the kind of evidence which he would consider (under sec. 13), the court held that he should consider all competent evidence offered, should give the applicant a hearing, and admit all competent evidence bearing upon the questions at issue; and if the evidence submitted amounts to satisfactory proof that the applicant was a physician and surgeon in practice in this State at the time of the passage of the act, he should be registered and a certificate issued to him; if not, his application should be denied.

To regent, from applicants under section 10, $5 (*ib.*, s. 10).
To regent, from applicants under section 13, $1 (*ib.*, s. 13).

NEW JERSEY.[1]

STATE BOARD OF MEDICAL EXAMINERS.—The State board of medical examiners, appointed by the governor with the advice and consent of the Senate, consists of nine members, persons of recognized professional ability and honor, five of the old school, three of the homœopathic, and one of the eclectic (Act 1894, c. 306, s. 1).

The board must hold meetings for examinations at the capitol building on the third Tuesday of June and October of each year and at such other times and places as they deem expedient; they shall keep a register of all applicants for a license to practise medicine and surgery, showing the name, age, nativity, and last and intended place of residence of each candidate, the time he or she has spent in a competent academic education, as hereinafter provided, and in medical study in or out of medical school, the names and location of all medical schools or examining and licensing boards which have granted said applicant any degree or certificate of attendance upon lectures upon medicine and surgery or State examinations, and whether the applicant was examined, rejected, or licensed under this act, and it shall be

[1] In State *v.* Chapman, 69 N. J. Law, 464 (1903), it was held that a similar law regulating dentristry did not impair vested rights of a dentist practising at the time of its enactment, nor was it an *ex post facto* law, citing Dent *v.* W. Va., 129 U. S., 114; State *v.* Creditor, 21 Am. St. R., 306; Hockett *v.* State, 105 Ind., 250; Hawker *v.* State, 170 U. S., 189, and 22 Am. & Eng. Enc. Law (2d ed.), 781, 782. It also holds that a profession is property and can not be taken away without compensation, but that the dentistry law in question was simply a regulation controlling the conditions under which the profession may be enjoyed or pursued, and it is within the power of the State to place reasonable regulations upon the business or calling of any person. Citing State *v.* State Medical Examining Board, 32 Minn., 324; Hewitt *v.* Charier, 16 Pick, 353; Eastman *v.* State, 109 Ind., 278; Hedderich *v.* State, 51 Am. Rep., 768; Sheldon *v.* Clark, 1 Johns. (N. Y.), 513; Gosnell *v.* State, 52 Ark., 228.

On the Act of 1830, January 29th, regulating the practice of physic and surgery, and incorporating the Medical Society of New Jersey, and the Act of 1864, March 14th, reorganizing said society, see Hill *v.* Morrison, 46 N. J. L., 488.

Between 1866 and 1876 no diploma or authority to practise medicine was required in New Jersey. Haase *v.* State, 53 N. J. L., 34.

On criminal libel in alleging that a person had registered as a physician on a forged diploma, where no diploma or authority to practise medicine is required by law, see Haase *v.* State, 53 N. J. L., 34. See note in the text, at foot of New Jersey, respecting former laws.

prima facie evidence of all matters contained therein (*ib.*, s. 3, as amd. Act 1903, c. 228, s. 1).(See Appendix, p. 696.)

QUALIFICATION.[1]—All persons commencing[2] the practice of medicine or surgery in any of its branches must apply to the board for a license (*ib.*, s. 4, as amd. Act 1903, c. 228, s. 2).

EXAMINATIONS.—Applicants for examination must present to the secretary of the board, at least ten days before the commencement of the examination at which he or she is to be examined, a written application on a form or forms provided by the board, with satisfactory proof that the applicant is more than twenty-one years old, is of good moral character, has obtained at least a certificate or diploma[3] issued after four years of study, either in a normal, manual training or high school of the first grade in this State, or in a legally constituted academy, seminary or institute of equal grade, or a student's certificate of examination for admission to the freshman class of a reputable literary college,[4] or has received an academic education considered and accepted by the State superintendent of public instruction as fully equivalent, and has either received a diploma conferring the degree of doctor of medicine from some legally incorporated medical college (which in the opinion of the board was in good standing at the time of issuing said diploma) in the United States, or a diploma or license conferring the full right to practise all the branches of medicine and surgery in some foreign country, and has also studied medicine not less than four school years of at least nine months each, including four satisfactory courses of lectures of at least seven months each in

[1] See note in text at foot of New Jersey Laws.

[2] The period of nine months allowed to dentists already in practice to comply with the dental law of 1890 was reasonable. State *v.* Chapman, 69 N. J. Law, 464, citing Battles *v.* Board of Dentistry (R. I.), 17 Atl. R., 131.

[3] That a training school for nurses will not be compelled by mandamus to issue a diploma to a student who has passed the required period of study, when in the judgment of the proper authorities of the school after fair investigation she has not with credit completed such a course—see Niles *v.* Orange Training School, 63 N. J. L., 528 (34 Vr.), citing Kirchgessner *v.* Board of Health, 24 Vr., 594. See p. 383, GRADUATE NURSES.

[4] Where a valid ordinance required presentation of a certificate or diploma from a reputable school or college, it was held that, in the absence of other express provision, the body which was to act on the certificate or diploma had the right to determine whether the school or college whose diploma was presented was reputable, and that with the duty of decision goes the right and duty of inquiry and investigation; after the determination a court cannot review it in an application for a writ of mandamus. Kirchgessner *v.* Board of Health, 53 N. J. L., 594.

four different calendar years in some legally incorporated American or foreign medical college or colleges prior to the granting of said diploma or foreign license; provided that candidates for license who graduated prior to July 4, 1903, and have been in continuous and reputable practice for at least five years since graduation, may be admitted to the examinations of this board upon certified and satisfactory evidence of moral character and of three courses of medical lectures in different calendar years, and of a competent academic education according to the standard of that time, as determined in the case of non-graduates of academic institutions by the State superintendent of public instruction, provided, however, that such substitution and exemption be specified in the license; provided, further, that candidates for license who graduated prior to July 4th, 1894, and have been in continuous and reputable practice since graduation, may be admitted to the examinations of this board upon certified and satisfactory evidence of moral character, and of two courses of medical lectures in different calendar years, and of a competent academic education according to the standard of that time as determined in the case of non-graduates of academic institutions by the State superintendent of public instruction; and provided, further, that such substitution and exemption be specified in the license; and if said application is approved, and the applicant shall have deposited $25 with the treasurer of the board as an examination fee, and said applicant may in case of failure to pass the examination be re-examined at any regular examination within one year without the payment of an additional fee, the applicant shall sign his or her name opposite a number in a book kept for that purpose by the secretary, and shall mark his or her examination paper with said number, and shall be known to the members of the board only by said number until his or her papers have been examined and marked. Applicants examined and licensed by or who are or have been members of State examining and licensing boards of other States, upon the payment of $50 to the treasurer of the board and the filing with the secretary of the board of a copy of his or her license or certificate, certified by the affidavit of the president and secretary of such board, showing also that the standard of requirements of said board at the time *of* [*sic !*] said license or certificate was issued was substantially the same as that required by said board,

and of his or her affidavit as to the personality thereof, may be granted a license by said board without further examination (*ib.*, s. 4, as amd. Act 1903, c. 228, s. 2).[1]

All examinations shall be both scientific and practical, and of sufficient severity to test the candidate's fitness to practise medicine and surgery (*ib.*, s. 5).

All examinations shall be written in English; the questions and answers, except in materia medica and therapeutics, must be such as can be answered in common by all schools of practice, and if the applicant intends to practise homœopathy or eclecticism, the member or members of the said board of those schools respectively shall examine the said applicant in the materia medica and therapeutics of the school in which the applicant intends to practise.

Applicants are examined in materia medica and therapeutics, obstetrics and gynæcology, practice of medicine, including diseases of the skin, nose, and throat, surgery, including surgical anatomy, and diseases of the eye, ear, and genito-urinary organs, anatomy, physiology, chemistry, histology, pathology, bacteriology, hygiene, medical jurisprudence, and such other branches as the board may decide. If the examination is satisfactory, the board shall issue a license entitling the applicant to practise medicine and surgery.

The votes of all examiners shall be by yes or no and written with their signatures upon the backs of the examination papers of each candidate; said application and examination papers shall be deposited in the State library in the capitol building, and shall be *prima facie* evidence of all matters therein contained (*ib.*, s. 5).

Refusal, Revocation.—The board may refuse[2] or revoke a license for chronic and persistent inebriety, the practice of criminal abortion, conviction of crime involving moral turpitude, or for publicly advertising special ability to treat or cure chronic and incurable diseases, or where any person shall present to the board any diploma, license, or certificate that shall have been illegally obtained or that shall have been signed or issued unlawfully or under fraudulent representations (*ib.*, s. 6).

[1] Sec. 4 as amended 1903 is very much involved in its form, as will be noted in any effort to read it. Its meaning, however, seems obvious.

[2] *Mandamus* cannot be awarded to compel permission to register unless the relator makes it clear that the duty of the board is clear and imperative, and its exercise without choice or discretion. Kirchgessner *v.* Board of Health, 53 N. J. L., 594.

In complaints for violating this section, the accused shall be furnished with a copy of the complaint and given a hearing before the said board in person or by attorney; any person, after such refusal or revocation, who shall attempt or continue the practice of medicine, shall be subject to the penalties hereinafter prescribed (*ib.*, s. 6).

Filing.—A person receiving a license must file it, or a certified copy thereof, with the clerk of the county in which he or she resides, who shall file the said certificate or copy thereof, and enter a memorandum thereof, giving the date of the license and the name of the licensee, in a book provided for the purpose; and in case of removal into another county he or she must procure from the said clerk a certified copy of such registration, and file it with the clerk in the county to which he shall remove, who shall similarly file and enter it with like effect (*ib.*, s. 7).

Definition.—Any person is regarded as practising medicine or surgery who shall use the words or letters "Dr.,"[1] "Doctor," "Professor," "M.D.," or "M.B." in connection with his or her name, or any other title intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches, and who in connection with such title or titles or without the use of such titles shall prescribe[2] for the use of any person or persons any drug or medicine or other agency or application[3] for the treatment, cure, or relief of any bodily injury, infirmity, or disease (*ib.*, s. 8). The use of any one of the afore-mentioned titles or the exposure of a sign, circular, adver-

[1] A card bearing the name "Dr. Albert Mayer," given to a witness, with a bottle of medicine, by Albert Mayer, a pharmacist, was under the act *prima facie* evidence that the defendant was practising medicine at the time. Mayer *v.* State, 64 N. J. L., 323 (35 Vr.) (Ct. of Err. and App.).

[2] The word "prescription" has long since passed from its general and etymological meaning to a concrete and substantive use—not even participial—standing not for the act, but for the thing, to wit, a written medical recipe. Mayer *v.* State, 63 N. J. L., 35 (34 Vr.) (N. J. Supr. Ct.).

[3] The phrase "other agency or application" in its general sense would undoubtedly include the use of the hands; but under the maxim "*noscitur a sociis*," its interpretation in this law should be such as will confine it to the class in which its special associates (*i.e.*, drug, medicine) stand. As a phrase employed to create and define offences unknown to the common law, it must be strictly construed. The legislature by drug or medicine plainly contemplated the use of something other than the natural faculties of the actor, some extraneous substance; and a similar restriction must attach to "agency" and "application," and they must likewise be held to import only some extraneous substance (citing State *v.* Leffring, 61 Ohio St., 39; 46 L. R. A., 334). Therefore an osteopath who merely manipulated his patients with his hands was improperly convicted. State *v.* Herring, 56 Atl. R., 670 (1904) (Supreme Ct. of N. J.) See App., p. 697.

tisement, or any other device or information, indicating thereby the occupation of the person or persons, shall be *prima facie* evidence.[1] The provisions of this act apply to all persons professing and attempting to cure diseases by means of the so-called system of "faith curism," "mind healing," laying on of hands, and other similar systems (*ib.*).[2]

EXCEPTIONS.[3]—The act does not apply to commissioned surgeons of the United States army, navy, or marine hospital service while so commissioned, or to lawfully qualified physicians or surgeons residing in other States meeting registered physicians and surgeons of this State in consultation, or to any legally qualified physician or surgeon of another State taking charge of the practice of a legally qualified physician or surgeon of this State temporarily during the latter's absence therefrom and upon the written requests to said board therefor, or to any physician or surgeon of another State, and duly authorized under the laws thereof to practise medicine and surgery therein, provided such practitioner shall not open an office or place for the practice of his profession within the borders of this State; or to any one while actually serving as a member of the resident medical staff of any legally incorporated charitable or municipal hospital or asylum, or to any legally qualified and registered dentist exclusively engaged in practising the art of dentistry, or to any person claiming the right to practise medicine and surgery in this State who has been practising therein since before July 4th, 1890, provided the said right or title was obtained upon a duly registered diploma of which the holder and applicant was lawfully possessed and was issued by a legally chartered medical institution which in the opinion of said board was in good standing at the time said diploma was issued, or to any person resident of this State who has been continuously engaged in giving treatment by electricity herein during the past fourteen years, provided said person was graduated from a legally incorporated electro-therapeutic school

[1] See n. 1, p. 379.

[2] The practice of physiognomy, palmistry, and like crafty science is disorderly conduct in New Jersey. See State *v.* Kenilworth, 69 N. J. L., 114 (1903).

[3] It is no defect in an indictment that it omits to aver that the defendant is not one of the persons classified and excepted by the ninth section; correct pleading does not require a negative averment unless the exception be in the enacting clause of the penal statute; if it be in a separate clause or a subsequent statute it is matter of defence. Mayer *v.* State, 63 N. J. L., 35 (34 Vr.) (N. J. Supr. Ct.), affd. 64 N. J. L. (35 Vr.), 323 (Ct. of Errors and App.). See this case on affirmance, for discussion of what is meant by the enacting clause.

in good standing, or to any legally licensed and registered pharmacist of this State actually engaged in the practice of his profession, but this exception shall not be extended so as to give said licensed pharmacist the right and authority to carry on the business of a dispensary, unless said dispensary shall be in charge of a legally licensed and registered physician and surgeon of this State; or to any legally licensed and registered veterinary physician, surgeon, or dentist of this State engaged in the practice of veterinary medicine, surgery, or dentistry in any of its branches, or to any professional nurse, *massieur* (*sic!*), or electrician operating in each particular case under the specific direction of a regularly licensed physican or surgeon, or to any person or persons giving aid, assistance, or relief in emergency or accident cases pending the arrival of a regularly licensed physician and surgeon (*ib.*, s. 9, as amended Act 1895, c. 238, March 22d, 1895, and Act 1903, c. 228, s. 3).

Offence—Penalty.—Commencing or continuing the practice of medicine and surgery in any of its branches without first having obtained and filed the license or contrary to the act[1] is a misdemeanor, punishable for the first offence by a fine not less than $100, or imprisonment in the county jail not less than thirty days, or both fine and imprisonment, and for each subsequent offence the punishment shall be double that of the preceding one; it shall be the duty of the respective district attorneys of the counties to prosecute violations of the act (Act 1894, c. 306, s. 10).[2]

Fees.—To the treasurer of the board, for examination, $25, to be returned in case of failure.

[1] In Kirchgessner *v.* Board of Health, 53 N. J. L., 594 (1891), it was conceded that the board of health and vital statistics of Hudson County was empowered by legislative authority to pass an ordinance operative in Hudson County prohibiting any person from practising as a physician without having presented to the board for inspection the proper certificate or diploma of his graduation from some reputable school or college of medicine or surgery, or his license under the laws of the State, to practise medicine, and satisfying the board that he is the identical person named therein, and writing in his own handwriting in a book of registry his name, place of residence, and date and place of graduation, under penalty of $100.

In Kirchgessner *v.* Board of Health it was said, however, that it was extremely questionable whether a person could pursue the profession of physician or surgeon after the Act of 1890 without obtaining the license from the board constituted by that act, notwithstanding it was claimed that a previous law authorized the board of health of Hudson County to pass an ordinance admitting physicians to practise in that county.

[2] The Act of 1880 regulating the practice of medicine and surgery did not impair the right to recover for medical services before it went into effect. Hill *v.* Morrison, 46 N. J. L., 488.

To the treasurer of the board, for license without examination, $50 (*ib.*, s. 4).

To the county clerk, for registering license, $1 (*ib.*, s. 7).

MIDWIFERY—QUALIFICATIONS.—Every person practising midwifery in any of its branches shall possess a certificate from the State board of medical examiners (Act 1892, p. 316, s. 1).

MIDWIFERY—FORMER PRACTITIONERS.—The act provides for the licensing within thirty days[1] after its passage of every person practising midwifery in cities of the first and second classes (*ib.*, s. 2).[2]

MIDWIFERY—EXAMINATIONS.—Persons beginning the practice of midwifery in the State after the passage of the act must appear before the State board of medical examiners and submit to such examinations in midwifery as the board shall require, and if the examination is satisfactory to the examiners, the board, on receipt of $5, shall issue a certificate, entitling the person named to practise midwifery (*ib.*, s. 3).

MIDWIFERY—FILING.—The person receiving said certificate shall file it or a true copy with the clerk of the county in which she resides, and the clerk shall file the certificate or a copy, and enter a memorandum giving the date of certificate and the name of the person to whom issued and the date of filing, in a book kept for the purpose (*ib.*, s. 4).

MIDWIFERY—THE STATE BOARD OF MEDICAL EXAMINERS are authorized to execute the act, and shall hold examinations at such times and places as may be deemed expedient (*ib.*, s. 5).

MIDWIFERY—REFUSAL—REVOCATION.—The said board may refuse licenses to persons guilty of unprofessional or dishonorable conduct, and may revoke licenses for like cause, or for neglect to make proper returns to the various health officers of births and the cases of puerperal and other contagious diseases occurring in their practice (*ib.*, s. 6).

MIDWIFERY—DEFINITION—EXCEPTIONS.—A person shall be regarded as practising midwifery who shall publicly profess by advertisement, sign, card, or otherwise to be a midwife, or who shall, for a fee, attend to women in childbirth, but nothing

The right to adequate compensation arises upon the rendition of services, wherever fees are otherwise recoverable by suit at law, and does not depend upon the measure of success in effecting a cure, but upon the diligent exercise under his employment of the skill which commonly pertains to his profession. Ely *v.* Wilbur, 49 N. J. L., 685.

[1] See note 2, p. 376.

[2] See note 2, p. 381.

in the act prohibits gratuitous service in case of emergency, nor to legally qualified physicians or surgeons of the State (*ib.*, s. 7).

MIDWIFERY—OFFENCE—PENALTY.—Practising midwifery without compliance with the provisions of the act is a misdemeanor, punishable by fine $10 to $50, or imprisonment in the county jail ten to thirty days, or both, in the discretion of the court (*ib.*, s. 8).

MIDWIFERY—FEES.—To board of examiners, for certificate to midwife, $5 (*ib.*, s. 3).

To county clerk for registry of same, 25 cents (*ib.*, s. 4).

GRADUATE NURSES.—Acts 1903, c. 109, and 1905, c. 208, provide for the licensing of graduate nurses, and, in certain cases, nurses who are entitled to, but have not received a diploma. A synopsis of these laws is not within the scope of this article.

[NOTE.—There are a number of former medical laws, not specifically repealed, which will be found in the General Statutes of 1895, but which appear to be inconsistent with, and therefore repealed by, the present law.]

NEW MEXICO.[1]

BOARD OF HEALTH.—The New Mexico Board of Health is composed of seven reputable physicians of known ability, gradu-

[1] The Act of 1903, c. 40, is entitled "an act to amend chapter 18 of the laws of New Mexico of 1901." The Act of 1901, c. 18, is entitled "an act to regulate the practice of medicine and to provide for a board of health in New Mexico." Except in its title the Act of 1903 does not purport to amend c. 18 of Act of 1901. It repeals (by sec. 12) sec. 3 of the Act of 1901, and makes no other mention of the Act of 1901, and it repeals all acts and parts of acts in conflict with it. In the abstract above the Act of 1903 is treated as though it repealed the Act of 1901, as an act in conflict with it. Certain provisions of the Act of 1901 are not necessarily in conflict with the Act of 1903. Such are: the provision of sec. 2, that the members of the board shall be the sole judges of the qualification of a person desiring to practise medicine in New Mexico; the provision of sec. 1, that the board of health shall consist of four regular physicians, two homœopathic physicians, and one eclectic physician; the provision of sec. 5, that the board shall be the sole judges of what constitutes unprofessional or dishonorable conduct; the provision of sec. 11, that all actions begun under the provisions of the act shall be commenced within one year from the date the cause of action originates, and that it is the duty of the district attorneys to see that the provisions of the act are enforced and to prosecute all violators of any of its provisions. Similarly ch. 18 of 1901 only repealed all acts and parts of acts in conflict with it. It has been assumed in the text above, as it was entitled "an act to regulate the practice of medicine and to provide for a board of health in New Mexico," that it superseded the preëxisting law, which will be found in the Compiled Laws of 1897, s. 3,694 *et seq.*

Such legislation is valid (citing Williams *v.* People, 121 Ill., 87). *In re* Roe Chung, 49 Pac. R., 952 (Supr. Ct. of N. M.).

ates of medical schools of good standing, registered practitioners and bona-fide residents of New Mexico, appointed by the governor (Act 1903, c. 40, s. 1).

The board holds meetings in Santa Fé in the capitol building on the first Mondays of June and December, and special meetings in cases of emergency (*ib.*, s. 2). The board shall upon the production of evidence satisfactory to it license any reputable person who is a graduate of a medical college in good standing, as defined by this act to practise medicine, surgery, and obstetrics in New Mexico. The president and secretary of the board are empowered to administer oaths; and a false oath or affidavit before the board is perjury, and subject to the punishment for perjury (*ib.*, s. 3).

Definition.—A *medical college in good standing*,[1] for the purposes of this act, is one of at least ten years' continuous existence, one which now (April 11th, 1903[2]) requires a high-school certificate or its equivalent for admission to it, and one which now (April 11th, 1903[2]) or hereafter requires an attendance on and gives four full courses of four separate years, and one which has ample clinical facilities such as are furnished in large cities.

The board is required at its December meeting in each year to prepare and cause to be printed and distributed, for the information of those interested, a copy of this law and a list of the medical colleges in the United States of America recognized by it to be in good standing under this section (*ib.*, s. 3).

The board is required to recognize any honorary or emeritus degree conferred upon any eminent foreigner by any such college as fully and to the same extent as if the applicant were a regular graduate thereof (*ib.*, s. 3).

Temporary License.—The secretary of the board shall issue a temporary license to any person complying with the provisions of this act, who has paid the fee to the secretary (*ib.*, s. 3) (see below, Fees).

Recording.—The certificate must be recorded in the probate clerk's office in the county in which the practitioner resides,

[1] Graduation and diploma are not necessary if examination satisfactory to the board of health be passed. *In re* Roe Chung, 49 Pac. R., 952. [So held under former law. The Act of 1903 by repealing sec. 3 of the Act of 1901, dispensed with examination as a test or qualification.]

[2] Act 1903, c. 40, was approved March 12th, 1903, it provided that it should take effect thirty days after its passage.

within thirty days from its issue, and the date of recording shall be indorsed thereon; the certificate, or a copy of the registration, must be again recorded in any county to which the practitioner may remove permanently (*ib.*, s. 4).

Evidence.—The fact that no such certificate shall be found recorded in the county where any person is practising or offering to practise medicine shall be accepted by the court as *prima facie* evidence that no such certificate has been issued, and shall throw the burden of proving that he has a certificate upon the defendant in any suit or prosecution begun against him for the violation of the provisions of this act (*ib.*, s. 4).

Refusal—Revocation.—It is the duty of the board to refuse to license any person guilty of immoral, dishonorable, or unprofessional conduct; the board shall also revoke and annul any certificate which has been issued by it or any previous board, upon satisfactory proof to the board that the holder of said certificate or diploma has been guilty of immoral, dishonorable, or unprofessional conduct. Five days' notice in writing shall be given to the person accused of improper conduct, with a copy of the charge against him, requiring him on a day named to appear before the board and show cause why his license should not be revoked or cancelled. When any such license has been revoked or cancelled by the board, the board shall send notice in writing, under the hand of the secretary, which shall be filed for record and recorded in the book in which physicians' licenses are recorded in the office of the probate clerk of the county in which the person whose license has been revoked resides (*ib.*, s. 5).

Offences after Revocation.—Any person whose certificate has been revoked or cancelled by the board under this act, who shall thereafter practise or attempt or offer to practise medicine in New Mexico, is guilty of a misdemeanor and shall be punished as required in section 9 (*ib.*, s. 5).

Definition—Exceptions.—For the purposes of this act, the words "practice of medicine" shall mean to open an office for such purpose, or to announce to the public or any individual in any way a desire or willingness or readiness to treat the sick or afflicted, or investigate or diagnose or offer to investigate or diagnose any physical or *medical* (*sic!*) ailment or disease of any person; or to suggest, recommend, prescribe, or direct for the use of any person any drug, medicine, appliance, or other agency, whether material or not material, for the cure, relief, or

palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury or deformity, after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation. The act shall not prohibit gratuitous services in cases of emergency or the domestic administration of family remedies, or women from practising midwifery, nor apply to surgeons in the service of the United States in the discharge of their official duties (*ib.*, s. 6).

Vendor—License.—Any vendor, except licensed druggists, of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of disease or injury, or who shall, by writing or printing or any other method, profess to cure or treat disease or deformity by any drug, nostrum, manipulation, or other expedient, shall pay a license of $100 per month into the treasury of the board; upon which payment such vendor shall be licensed by the board to sell drugs, *nostrum* [*sic*], medicines, and ointments (*ib.*, s. 8).[1]

Vendor—Offence.—Any person so vending or attempting to sell, either from his home or office or from vehicles or by travelling through the country on foot or horseback, any such drugs, medicines, or ointments, without paying such license, is guilty of a misdemeanor, punishable by a fine not to exceed $100, or imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment in the discretion of the court (*ib.*, s. 8).

Licentiates of Other States and Territories.—The board may, upon payment of the fees provided in section 7, grant licenses to licentiates of other States and Territories which have like requirements as this act provides for, and when said States and Territories also honor our licenses or certificates, to the same extent as they now recognize our licenses, and no further (*ib.*, s. 9).

Penalty.[2]—Practising medicine or attempting to practise medicine without first complying with the provisions of this

[1] Act 1905, c. 107, provided for a deposit of $1,000 in cash with the County Treasurer and the payment of an annual license fee by each itinerant vendor. It repealed all inconsistent acts. It did not by specific reference repeal this provision of the medical law.

[2] A statute authorizing a remedy begun as an action of debt and eventuating in imprisonment is within the police power. *In re* Roe Chung, 49 Pac. R., 952.

A justice of the peace has jurisdiction, notwithstanding the provisions for imprisonment (so held

law and without being the holder of a certificate entitling him to practise medicine in New Mexico is a misdemeanor, and is punishable with a fine of $100, or imprisonment in the county jail not to exceed ninety days, or by both such fine and imprisonment in the discretion of the court, for each and every offence (*ib.*, s. 9).

FINES.—One-half of every fine collected under the provisions of this act shall go, and be paid by the court in which conviction is had, to the sheriff, deputy sheriff, constable, or other person who makes complaint and arrests and causes to be prosecuted the person so convicted; the other half shall go to and be the property of the board of health (*ib.*, s. 10).

RULES AND REGULATIONS.—The board of health is authorized to make all necessary rules and regulations for carrying out the provisions of this act (*ib.*, s. 11).

FEES.—To the secretary of the board, from each applicant to practise medicine in New Mexico, $25 (*ib.*, s. 7).

OSTEOPATHY.—Any graduate of any recognized college or school of osteopathy in the United States or Europe where the course of study comprises at least four terms of five months each, shall be authorized to practise the profession of osteopathy and osteopathic surgery, and administer the treatment to the sick and afflicted known as the science of osteopathy and as taught by the recognized schools; such person shall have his diploma from said school recorded, and such osteopaths shall file an affidavit as to good moral character, and that the person presenting the diploma is the rightful owner thereof, to the probate clerk of the county where said person resides and the probate clerk shall register said diploma (Act 1903, c. 90, s. 1).

OSTEOPATHY—OFFENCE.—Any osteopath who prescribes, gives, or uses any medicines or drugs, or who practises major or operative surgery, or who calls or advertises himself or herself in any way other than as osteopathic physician or osteopathic surgeon, shall be guilty of a misdemeanor, and punishable as provided in sec. 9 of house bill 36, of the Thirty-fifth legislative assembly (the medical law of 1903, which see, *supra*, page 386),[1] notwithstanding any requirements or provisions of the act of 1901 to regulate the practice of medicine (*ib.*).[1]

under the former law). *In re* Roe Chung, 49 Pac. R., 952.

For proceedings on application for writ of *prohibition* against justice of the peace, acting under the act which this act supersedes, see *in re* Roe Chung, 49 Pac. R., 952.

[1] It will be noted that this act (c.

Optometry.—Act 1905, c. 96, regulates the practice of optometry; it is not within the scope of this abstract. It does not apply to physicians and surgeons authorized to practise under the laws of the Territory (Act 1905, c. 96, s. 16).

New York.[1]

Prohibition.—No person can lawfully practise medi-

90 of 1903) treats the medical laws of 1903 and 1901, both as existing acts; see p. 383, n. 1.

[1] The legislature in the exercise of its discretion under the police power of the State, may by act impose reasonable conditions and requirements under which individuals may practise the profession of medicine and may restrain and prohibit all persons not complying therewith from engaging in such practice. People *v.* Hawker, 152 N. Y., 234 (affd. 170 U. S., 189), citing Dent *v.* W. Va., 129 U. S., 114.

The fact that a person has practised medicine before the enactment of the law does not restrict the power of the State, as a police regulation, to compel the taking out of a license to justify subsequent practice. People *v.* Fulda, 52 Hun, 65.

It is in no way interfering with vested rights to determine under what conditions citizens shall be entitled to pursue a vocation. Mayor *v.* Bigelow, 13 Misc. 42.

Historical View of the New York Legislation.—Those who are interested in the former laws of New York regulating the practice of medicine and surgery are referred to the following laws and decisions, which in respect to the practice of medicine and surgery are so far superseded by or inconsistent with the provisions of the present law that they are not set forth in this article at any length: June 10th, 1760, regulating the practice of physic and surgery in the city of New York, 2 Smith *v.* Livingston, 188, 1 Van Schaack, 382; March 27th, 1792, regulating the practice of physic and surgery in the city of New York, 2 Greenleaf, 425; March 23d, 1797, providing for the licensing of physicians and surgeons after two years' study, by the chancellor, a judge of the Supreme Court or Common Pleas or a master in chancery, 3 Greenleaf, 417, 419. Revised April 4th, 1801, 1 Kent and Radcliff, 449, amended March 22d, 1803, 3 Webster, 334 (see note to c. 94, Rev. Laws of 1813, vol. ii., p. 219).

Act 1806, c. 138, authorizing the incorporation of county medical societies, and the Medical Society of the State of New York, empowering them to examine students and give diplomas sufficient to empower the holder to practise physic or surgery or both in any part of the State, and depriving any practitioner not holding such diploma, of the right to collect debts incurred by such practice, in any court of the State; but excepting from its operation persons coming from any other State or country and there duly authorized to practise, and having a diploma from a regular medical society; three years' regular study of physic or surgery, or both, with one or more reputable practitioners was a prerequisite to examination. Continued N. Y. Revised Laws 1813, c. 94.

Act 1814, c. 110, granting the same privileges to county medical societies in newly organized counties.

Act 1844, c. 275, liberalizing the laws regulating the practice of medicine and surgery so as to practically abrogate them (see cases below).

Act 1900, c. 452, incorporating New York State Medical Association.

Act 1904, c. 1, authorizing the consolidation of the Medical Society of the State of New York (incorporated under the law of 1806) and the New York State Medical Society organized under the law of 1900, c. 452. Those interested in the various amendments to these early laws will find a table of them in Birdseye's Chronological Table of New York Statutes (see also White *v.* Carroll below).

Sheldon *v.* Clark, 1 Johns., 513 (1806), that it was incumbent on the defendant in an action to recover the penalty for practising and administering medicine contrary to the act

cine [1] unless registered and legally authorized prior to September 1st, 1891, or unless licensed by the regents of the University of the State of New York and registered as required by the present law; [2] nor can any person lawfully practise medicine who has ever

(Laws of N. Y., vol. i., p. 449), of whom it was shown that he administered medicine, to bring himself within some of the provisos of the act.

Timmerman *v.* Morrison, 14 Johns., 369 (1817), that a person practising medicine without the license provided in Rev. Laws 1813, c. 94, cannot escape the penalty unless he shows that he practised gratuitously, or administered only roots, bark or herbs, the growth or produce of the United States.

White *v.* Carroll, 42 N. Y., 161, the legislation of the State from March 23d, 1797 (3 Greenleaf, 427) to May 6th, 1844 (Law 1844, p. 406), so far and continuously recognized and regulated the practice of the allopathic system or school of medicine (and which may still [1870] be called the old and perhaps the ordinary system or school of medicine) as the only legal system or school of medicine, that it is doubtful if one not licensed as an allopathic physician could, previous to the Act of 1844, have maintained an action against any one for calling him a quack. (See this case for a collection, p. 163, of the laws and decisions respecting the regulation of the practice.) See also p. 399, n. 2.

[1] Under the Act of 1874, c. 436 (a predecessor of the present law), requiring a license or diploma as a qualification to practise medicine or surgery, it was held that the object of the legislature was only to provide for regulating the practice of medicine or surgery, as those terms are usually or generally understood, and that it did not include, and did not prohibit treatment consisting entirely of manipulation with the hand, performed by rubbing, kneading, and pressure; and that a person who had performed such service for an agreed compensation was entitled to recover it, though he had no diploma and was not licensed to practise medicine or surgery. Smith *v.* Lane, 24 Hun, 632 (Supr. Ct., Gen. T., 1st Dept., 1881).

The practice of medicine includes the application or use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases; surgery is limited to manual operations usually performed by surgical instruments or appliances. Smith *v.* Lane, 24 Hun., 632.

It was proper for the legislature to regulate the practice of medicine and surgery; but there was no occasion to regulate treatment by manipulation with the hand; and the object of the law was not to prevent mere imposition upon credulous person; and the fact that the manipulator professes more for his art than he has the ability to accomplish does not subject him to the disability provided by this law (1874, c. 436, Smith *v.* Lane, 24 Hun., 632).

A person who merely manipulates with the hands, by rubbing, kneading, and pressing, is outside of both of the professions of medicine and surgery, and violates no law by practising without a diploma or license. Smith *v.* Lane, 24 Hun., 632 (1881). *Cf.* p. 241, note.

It is no defence to a party prosecuted for practising physic without being authorized by law, that the medicine he administered was a patent medicine and that he administered it as assignee of the patentee. Thompson *v.* Staats, 15 Wend., 395 (1836).

Letters patent authorize the patentee and his assigns to make, construct, use, and vend his compound, not to practise physic or surgery. *Ib.* [The court declined to consider the constitutional power of Congress to issue a patent broad enough to authorize the patentee to practise physic or surgery notwithstanding State laws, as the patent in question did not pretend to be so broad.]

A penalty, providing that an unlicensed physician shall not recover compensation for his services, does not change any rule of evidence. McPherson *v.* Cheadell, 24 Wend., at p. 29 (1840).

[2] The object of this law is not to provide a trap for the *bona fide* and competent physician, who, through inadvertence or ill advice, fails to

been convicted of a felony[1] by any court, or whose authority to

secure a perfect registration, but to shut out from the practice of medicine those whose lack of knowledge of the human body and ignorance touching methods of treatment render their attempts to make diagnosis and prescribe treatment a menace to society. Ottaway *v.* Lowden, 172 N. Y., 129.

A physician who, on September 25th, 1880, complied with sec. 2 of the law then in force, was entitled to recover compensation for services rendered after October 1st, 1880, without having complied with sec. 4 of c. 513 of the laws of 1880, which went into effect on the latter date, as the latter act was not retroactive. MacEvett *v.* Maass, 64 App. Div., 383 (2d Dept., 1901).

In a suit for services, by a physician, a license is presumed until the contrary is shown. Thompson *v.* Sayre, 1 Denio, 175 (1845), citing McPherson *v.* Cheadell, 24 Wend., 15, 24, 29 (where the court merely expressed this view without deciding it).

Evidence that one was employed as a mere *sangrado*, like a steam or root doctor, would be *prima facie* evidence that he was not legally qualified (*ob. dic.*). McPherson *v.* Cheadell, 24 Wend., at p. 30, citing Collins *v.* Carnegie, 1 Ad. & E., 695; Pickford *v.* Gutch, 8 T. R., 305, n; Moises *v.* Thornton, *id.* 303.

On the evidence to show that a physician was employed as a regular practitioner, so as to raise the presumption of a license, in a suit between physician and patient for compensation for professional services, see McPherson *v.* Cheadell, 24 Wend., at p. 30 (1840).

The law does not and cannot supply any positive rules for the interpretation of medical science. Corsi *v.* Maretzek, 4 E. D. Smith, 1. See this case for a statement of the reasons and for an interesting and elaborate showing of the growth of medical science with experience and the successive explosion and abandonment of empirical theories and practices.

In the absence of statute, it is error to assume that a license or degree is necessary before a man can be considered in law as a practitioner of physic. Corsi *v.* Maretzek, 4 E. D. Smith, 1.

A license is presumed, in a suit for compensation for medical services, until the contrary is proved. Accetta *v.* Zupa, 54 App. Div., 33 (2d Dept., 1900), citing McPherson *v.* Cheadell, 24 Wend., 15; Thompson *v.* Sayre, 1 Denio, 175.

The State law precludes a patentee of medicines (not licensed as a physician) from peddling his nostrums in the character of a physician. Smith *v.* Tracy, 2 Hall, 465 (1829).

The rule "no cure, no pay" does not apply unless there is an express contract that it shall be applied. Bronson *v.* Hoffman, 7 Hun, 674.

[1] Sec. 145 imposes as one condition a good moral character; the presumption of bad character attaches to a person convicted of felony. People *v.* Hawker, 152 N. Y., 234.

A careful reading of People *v.* Hawker, 152 N. Y., 234 (at p. 243) will show that there is reasonable ground to contend that the decision of that case depended upon the fact that Hawker failed to show that he had the right to practise medicine at the time he was convicted of felony. In the Supreme Court of U. S. (170 U. S., 189) the judgment of the Court of Appeals of N. Y. was affirmed (but Justices Harlan, Peckham, and McKenna dissented). Hawker was convicted by the trial court, his conviction was reversed by the Appellate Division (14 App. Div., 188), the Court of Appeals reversed the Appellate Division, the Supreme Court U. S. affirmed the Court of Appeals. The last-mentioned court based its affirmance upon the power of the State, in the exercise of its police power for the protection of public health, to prescribe character as a qualification to practise, and also to prescribe what should be accepted as evidence of character, and that it is not for the courts to say that other evidence would be more satisfactory; but that this power is not arbitrary, and does not include the power to make a conclusive test of that which has no relation to character, but it may take whatever according to the

practise is suspended or revoked [1] by the regents on the recommendation of a State board [2] (Laws of 1893, c. 661, s. 140. Heydecker's Gen. Laws, N. Y., 2d ed., p. 2048).

experience of mankind, reasonably tends to prove the fact, and make it a test. See Appendix, p. 698.

In Hawker *v.* N. Y., 170 U. S., at p. 191, will be found in a footnote a collection of the statutes which in 1897 prescribed in a general way good character as one of the qualifications of a physician, and which also contained special provisions as to the effect of a conviction of felony, viz.: Colorado, Iowa, Louisiana, New Jersey, North Dakota, Vermont, Washington, Great Britain and Ireland, New Brunswick, Northwest Territory, Nova Scotia, Manitoba, British Columbia, Ontario, Newfoundland, Prince Edward's Island, New Zealand, Hawaii, and St. Lucia.

Sec. 140 and sec. 153 have reference only to misdemeanors committed after the passage of the act, but the felony charged as the former offence, which disqualifies under sec. 140, has reference to those committed before as well as after the passage of the act; it includes those who have ever been convicted of a felony, either before or after the passage of the law. Nor is this law a bill of attainder or *ex post facto* law; it does not violate Art. I., s. 10 of the Constitution of the United States. The law creates a second offence and provides a penalty for it, not for the previous felony. People *v.* Hawker, 152 N. Y., 234 (one judge concurring in result on ground of lack of evidence of right to practise at time of former conviction, and two dissenting); affd. 170 U. S., 189.

Where the indictment for unlawfully practising medicine names the patient, and no evidence is given on the trial as to the identity of the patient, there is a total failure of evidence to establish the offence charged. People *v.* Fulda, 4 N. Y. Cr. R., 133 (Supr. Ct. G. T., 1st Dept., 1886).

[1] In matter of Newell Smith, 10 Wend., 449 (1833), the court considered the provisions of 1 R. S., 452, providing for the expulsion of physicians from medical societies and the abrogation of their licenses in cases of gross ignorance or misconduct in their profession, or when guilty of immoral conduct or habits; and held it constitutional and valid; that it did not require a presentment or indictment under the Constitution, nor a trial by jury; that the trial could take place before the medical society, which was not a court and therefore not unconstitutional because it proceeded differently from a court; that the legislature could prescribe new causes for terminating rights previously granted with the reserved right to alter, modify, or repeal; that a medical society could renew charges previously passed on by them and not sustained, and that a prosecution unsuccessfully conducted by a medical society against an alleged unlawful practitioner in a court did not preclude it from subsequently inquiring and depriving him of his right to practise medicine and surgery under the statute.

On the distinction between proceedings under an indictment for abortion and proceedings to revoke a physician's license on account of the same abortion, and that an acquittal under the indictment is no bar to the revocation of the license, see In Matter of Newell Smith, 10 Wend., 449.

[2] Though a medical society be given power by statute to make by-laws and regulations relative to the admission and expulsion of members, the power is not arbitrary, nor unlimited, nor contrary to, nor inconsistent with, the laws of the State, and the by-laws must be reasonable and adapted to the purposes of the corporation, and a by-law fixing a minimum fee and declaring it dishonorable to accept less is unreasonable, against public policy, contrary to law and void, and a member expelled pursuant to such by-law may be reinstated by mandamus. People *v.* Medical Society of Co. of Erie, 24 Barb., 570 (1857). See also p. 503, n. 2.

BOARDS OF EXAMINERS.—There are three separate State boards of medical examiners of seven members each, representing respectively the Medical Society of the State, the Homœopathic Medical Society of the State,[1] and the Eclectic Medical Society of the State.

[1] In White *v.* Carroll (1870) it was said that the laws of the State since 1844 have not recognized any particular school or system of medicine as the legal or authorized school or system; and that the Act of 1844 authorized any one without any license to practise physic and surgery at the peril of being sued for malpractice or of being punished for a misdemeanor or convicted of gross ignorance, malpractice, or immoral conduct. Since the Act of 1844 allopathic and homœopathic physicians have had equal and like remedies for slanderous or libellous attacks on their professional reputations or characters (citing Corsi *v.* Maretzek, 4 E. D. Smith, 8). Since the Act of 1844 pretentious ignorance of the system makes the quack, not the system (see this case for definition of quack.) The court takes judicial notice that homœopathy is a distinct school of medicine, and that its practitioners are diffused through this and other States and countries.

In Bailey *v.* Mogg, 4 Denio, 60 (1847), it was said that since the Act of 1844 quackery might boast its triumphant and complete establishment by law. This case contains a chronological retrospect of the various laws regulating the practice of medicine and surgery; this retrospect is interesting as showing the gradual weakening from 1830 to 1844 of the laws designed to suppress quackery so that finally in 1844 all requirement for a license was abrogated (see *supra*, this note). The judge facetiously observes that by the Act of 1844 the legislature made every man a doctor; but he shows and holds that a botanic physician unlicensed in 1840, when he rendered the services, could not recover compensation in 1845.

In Corsi *v.* Maretzek, 4 E. D. Smith, 1 (1855), it was said that after the law of 1844 any one could practise physic in the State, subject only to an action for malpractice and to prosecution for a misdemeanor if grossly ignorant, guilty of malpractice or immoral conduct.

Where one physician, an allopathic practitioner, on the witness stand while under oath, denied that another (a homœopathic practitioner) was a physician, and characterized him as a quack, and the other sued him for libel and slander, *held* that if the witness believed his answers were pertinent and relevant to the question at issue, they were privileged; otherwise, if the jury should find that he was actuated by malice or knew the words were not relevant and availed himself of the opportunity to defame the plaintiff. White *v.* Carroll, 42 N. Y., 161.

In the absence of special statutes the law does not exclusively recognize any particular system of medicine or class of medical practitioners. Corsi *v.* Maretzek, 4 E. D. Smith, 1 (N. Y. Com. Pl., 1855).

In the absence of any statute regulating the practice of medicine, doctor simply means a practitioner of physic—the system of practice is immaterial (so held, where in a controversy between two laymen, the right of recovery turned upon the question whether a homœopathic physician was "a doctor"). Corsi *v.* Maretzek, 4 E. D. Smith, 1.

The action of a medical society in expelling a member cannot be reviewed by certiorari—the proper remedy is by mandamus or action. Where an appeal is allowed to the State Medical Society that remedy should be followed. People *v.* Medical Society of Dutchess Co., 84 Hun, 448 (2d Dept., 1895).

On the procedure before medical societies for expelling members, see People *v.* Medical Society of Dutchess Co., 84 Hun, 448 (1895), and People *v.* Medical Society of Erie Co., 32 N. Y., 187.

On the legal right of a licensed physician to compel his admission to a medical society by mandamus, see

The regents appoint examiners from lists of nominees furnished by the said societies. Each nominee before his appointment is required to furnish to the regents proof that he has received the degree of doctor of medicine from some registered medical school, and has legally practised medicine in this State for at least five years. If no nominees are legally before them, the regents may appoint from the members in good standing of such societies without restriction (*ib.*, s. 141).

Each board, or any committee thereof, may take the testimony and proofs concerning all matters within its jurisdiction. Each board may, subject to the regents' approval, make all by-laws and rules[1] not inconsistent with law, needed in performing its duties; but no by-law or rule by which more than a majority vote is required for any specified action by the board shall be amended, suspended, or repealed by a smaller vote than that required for action thereunder (*ib.*, s. 142).

At any meeting of the boards of examiners a majority constitute a quorum, but questions prepared by the boards may be grouped and edited, or answer papers of candidates may be examined and marked, by committees duly authorized by the boards and by the regents (*ib.*, s. 144).

Qualification—Admission to Examination.—The regents are required to admit to examination any candidate who pays a fee of $25, and submits satisfactory evidence, verified by oath, if required, that he—

(1) Is more than twenty-one years of age; (2) is of good moral character;[2] (3) has the general education required, preliminary to receiving the degree of bachelor or doctor of medicine

People *v.* Medical Society of Erie Co., 32 N. Y., 187.

A licensed physician does not forfeit his right to admission to a medical society by advertising his claims to peculiar skill; the code of medical ethics adopted by the society cannot bind those who are not members, and a person not a member is under no legal obligation to observe it. People *v.* Medical Society of Erie Co., 32 N. Y., 187.

[1] The grounds for expulsion under the by-laws and regulations of a medical society must be reasonable and lawful. People *v.* Medical Society of Dutchess Co., 84 Hun, 448. See also note 2, p. 391.

On the power of medical colleges to remove professor, see People *v.* N. Y. Medical School, 29 App. Div., 244.

[2] It is libellous *per se* to denounce a physician in his professional capacity, to impute to him the ignorance of a jackass, the brutality of a savage, and the fiendishness of a ghoul. To say of a physician that he is a humbug, or a quack, or a butcher, or a blockhead, or a quacksalver, or an empiric, or a mountebank, or that he is no scholar, or that his diploma is worthless, have all been held actionable *per se* as touching his vocation. Bommann *v.* Star Co., 174 N. Y., 212, affirming 72 App. Div., 633. See note 2, p. 389.

in this State; (4) has studied medicine not less than four full school years of at least nine months each, including four satisfactory courses of at least six months each in four different calendar years in a medical school registered as maintaining at the time a satisfactory standard. New York medical schools and New York medical students shall not be discriminated against by the registration of any medical school out of the State, whose minimum graduation standard is less than that fixed by statutes for New York medical schools. The regents may, in their discretion, accept as the equivalent for any part of the third and fourth requirement evidence of five or more years' reputable practice, provided that such substitution be specified in the license, and as the equivalent of the first year of the fourth requirement evidence of graduation from a registered college course, provided that such college course shall have included not less than the minimum requirements prescribed by the regents for such admission to advanced standing. The regents may also in their discretion admit conditionally to the examination in anatomy, physiology, and hygiene, and chemistry, applicants nineteen years of age certified as having studied medicine not less than two full years of at least nine months each, including two satisfactory courses of at least six months each, in two different calendar years, in a medical school registered as maintaining at the time a satisfactory standard, provided that such applicants meet the second and third requirements (Act 1893, c. 661, s. 145, subd. 4, as amd. Act 1901, c. 646, as amd. Act 1902, c. 243, s. 1); (5) has either received the degree of bachelor or doctor of medicine from some registered medical school or a diploma or license conferring full right to practise medicine in some foreign country, unless admitted conditionally to the examinations as specified above, in which case all qualifications, including the full period of study, the medical degree, and the final examinations in surgery, obstetrics, pathology, and diagnosis and therapeutics, including practice and materia medica, must be met (Act 1893, c. 661, s. 145).[1]

[1] The acts (1880, c. 513, s. 4; 1887, c. 647, s. 2; 1890, c. 500; 1893, c. 661) show throughout an intent to protect the people from imposition by the unlearned and unskilful who may nevertheless obtain from institutions in other States diplomas purporting to assure competency; to that end the certificate of the board of regents, based upon the unanimous recommendation of a board of medical examiners, is exacted, and the requirements of license and registration are insisted upon, and *not* for the purpose

The degree of bachelor or doctor of medicine[1] shall not be conferred in the State before the candidate has filed with the institution conferring it, the certificate of the regents that before beginning the first annual medical course counted toward the degree, unless matriculated conditionally as hereinafter specified (three years before the date of his degree), he had either graduated from a registered college or satisfactorily completed a full course in a registered academy or high school; or had a preliminary education considered and accepted by the regents as fully equivalent; or held a regent's medical student certificate, granted before this act took effect; or had passed regents' examinations as hereinafter provided. A medical school[2] may matriculate conditionally a student deficient in not more than one year's academic work or twelve counts of the preliminary education requirement, provided the name and deficiency of each student so matriculated be filed at the regents' office within three months after matriculation and that the deficiency be made up before the student begins the second annual medical course counted toward the degree. Students who had matriculated in a New York medical school before June 5th, 1890, and students who had matriculated in a New York medical school before May 13th, 1895, as having entered before June 5th, 1890, on the prescribed three years' study of medicine, shall be exempt from this preliminary education requirement.

A medical student certificate may be earned without notice to the regents of the conditional matriculation either before the student begins the second annual medical course counted toward the degree or two years before the date of the degree for matriculates in any registered medical school, in the four cases following:

1. For matriculants prior to May 9th, 1893, for any twenty counts, allowing ten for the preliminaries, not including reading and writing.

of bringing within the penalties of the statutes a physician coming from another State possessed of all the qualifications which the statutes require. Ottaway *v.* Lowden, 172 N. Y., 129.

[1] On mandamus as a proper remedy to compel the issue of a diploma by a college to a medical student who has complied with all of the conditions, see People *v.* Bellevue Hospital, 60 Hun, 107 (1891); 128 N. Y., 621.

A note on the legal relation between students and colleges (including medical colleges) and the legal rights of students and the expulsion, dismissal, and suspension of students will be found appended to Goldstein *v.* New York University, 11 N. Y. Ann. Cas., 127.

[2] See n. 1, p. 393.

2. For matriculants prior to May 13th, 1895, for arithmetic, elementary English, geography, spelling, United States history, English composition, and physics, or any fifty counts, allowing fourteen for the preliminaries.

3. For matriculants prior to January 1st, 1896, for any twelve academic counts.

4. For matriculants prior to January 1st, 1897, for any twenty-four academic counts.

But all matriculants, after January 1, 1897, must secure forty-eight academic counts, or their full equivalent, before beginning the first annual medical course counted toward the degree, unless admitted conditionally as hereinbefore specified, when the deficiency must be made up before the student begins the second annual medical course counted toward the degree (*ib.*, s. 145, as amended Act 1895, c. 636, and Act 1896, c. 111, and Act 1901, c. 646, s. 5).

Date of Effect and Application of Amendatory Acts.—This act (Act 1896, c. 111) shall take effect immediately, except that the increase in the required course of medical study from three to four years shall take effect January 1st, 1898, and shall not apply to students who matriculated before that date and who received the degree of doctor of medicine before January 1st, 1902 (Act 1896, c. 111, s. 2, defining application of s. 145 as amended as above).

This act (Act 1901, c. 646) shall take effect immediately (May 3d, 1901), except that the increase in the required course of medical study from three to four years shall not apply to students who matriculated before January 1st, 1898, and who received the degree of doctor of medicine before January 1st, 1902 (Act 1901, c. 646, s. 3).

Questions.—Each board is required to submit to the regents as required lists of suitable questions for thorough examinations in anatomy, physiology, and hygiene, chemistry, surgery, obstetrics, pathology and diagnosis, and therapeutics, including practice and materia medica. From these lists the regents are required to prepare question papers for all these subjects, which at any examination are required to be the same for all candidates, except that the examination may be divided as provided in section 145, and except that in therapeutics, practice, and materia medica all questions submitted to any candidate shall be

chosen from those prepared by the board selected by that candidate, and shall be in harmony with the tenets of that school as determined by its State board of medical examiners (Act 1893, c. 661, s. 146, as amd. by Act 1901, c. 646, s. 2).

Examinations and Reports.—Examinations for a license are required to be given in at least four convenient places in this State at least four times annually in accordance with the regents' rules, and exclusively in writing and in English. Each examination is conducted by a regents' examiner who shall not be one of the medical examiners. At the close of each examination the regents' examiner in charge is required to deliver the question and answer papers to the board selected by each candidate, or its duly authorized committee, and such board, without unnecessary delay, is required to examine and mark the answers and transmit to the regents an official report stating the standing of each candidate in each branch, his general average, and whether the board recommends that a license be granted. Such report must include the questions and answers and is filed in the public records of the university. If the candidate fails on a first examination, he may, after not less than six months' further study, have a second examination without fee. If the failure is from illness or other cause satisfactory to the regents, they may waive the requirement of six months' study (*ib.*, s. 147).

Licenses.—On receiving from a State board an official report that the applicant has successfully passed the examinations and is recommended for license, the regents are required to issue to him, if in their judgment he is duly qualified therefor, a license to practise medicine.[1] The contents and execution of the license are regulated in detail by the act.

[1] A study of the successive laws since 1880 (c. 513, 1880; c. 647, 1887; c. 500, 1890; c. 661, 1893) will be found in Ottaway *v.* Lowden, 55 App. Div., 410. This case was reversed on appeal in 172 N. Y., 129, on the ground that a validating certificate from the Regents under sec. 148 was retroactive; but the decision below also held, that a license is essential to recovery of compensation. See note 2, p. 389.

Though in honor and honesty an unlicensed physician who cures a patient should be paid, the courts sit to administer the law, and under the law the unlicensed physician cannot recover. Allcott *v.* Barber, 1 Wend., 525 (1828).

An unlicensed practitioner, who practised as a physician, surgeon, and apothecary, was not entitled to recover for his services, nor for the medicine furnished by him to his patient, even though the medicine was a patented medicine, and the physician was the patentee. Smith *v.* Tracy, 2 Hall, 465 (1829).

The fact that the patient is aware that his physician is not a licensed practitioner, does not enable the physician to recover compensation for

Applicants examined and licensed by other State examining boards registered by the regents as maintaining standards not lower than those provided by this article,[1] and applicants who matriculated in a New York State medical school before June 5th, 1890, and who shall have received the degree of "M.D." from a registered medical school before August 1st, 1895, may, without further examination, on the payment of ten dollars to the regents, and on submitting such evidence as they may require, receive from them an indorsement of their license or diploma conferring all the rights and privileges of a regents' license issued after an examination.

If any person whose registration is not legal because of some error, misunderstanding, or unintentional omission shall submit satisfactory proof that he had all the requirements provided by law at the time of his imperfect registration,[2] and was entitled to be legally registered, he may, on the unanimous recommendation of a State board of medical examiners, receive from the regents under seal a certificate of the facts, which may be registered by any county clerk and shall make valid the previous imperfect registration.[3]

Before any license is issued, it must be numbered and recorded in a book in the regents' office, and its number noted in the license. This record in all legal proceedings has the same weight as evidence that is given to a record of conveyances of land (*ib.*, s. 148).[4]

his services nor his medicine. Smith *v.* Tracy, 2 Hall, 465 (1829).

A medical student not yet licensed to practise is entitled to compensation for professional services rendered at the request of one who knew the fact (citing Bailey *v.* Mogg, 4 Denio, 60; White *v.* Carroll, 42 N. Y., 161); Bronson *v.* Hoffman, 7 Hun, 674 (2d Dept., 1876). [N.B. This is contrary to Accetta *v.* Zupa, 54 App. Div., 33; Fox *v.* Dixon, 34 N. Y. St. R., 710; Ottaway *v.* Lowden, 55 App. Div., 410; Allcott *v.* Barber, 1 Wend., 525; and Smith *v.* Tracy, 2 Hall, 465.]

[1] See note 1, p. 394.

[2] It requires him to show, not that he is now entitled to be legally registered, but that he was so entitled at the time of filing the imperfect registration. Ottaway *v.* Lowden, 172 N. Y., 129.

[3] Under sec. 148 the certificate granted by the regents to make valid a previous imperfect registration not only has the effect of validating the previous imperfect registration from the date of issue of the validating certificate, but it operates to give life to the imperfect certificate from the date of its filing, and hence authorizes a physician thereafter to recover for services rendered after filing his imperfect certificate and before obtaining the validating certificate, and also frees him from the misdemeanor of practising during that time. Ottaway *v.* Lowden, 172 N. Y., 129, reversing 55 App. Div., 410.

The legislature has provided for so correcting the imperfect registration as to give it the same effect as if it had been perfect in the first instance; it speaks of the time when the imperfect registration was made. Ottaway *v.* Lowden, 172 N. Y., 129.

[4] In McPherson *v.* Cheadell, 24

REGISTRY.—Every license to practise medicine is required,[1] before the licensee begins to practise, to be registered in the county clerk's office, where such practice is to be carried on,[2] with his name, residence, place and date of birth, and the source, number, and date of his license. Before registering, each licensee is required to file an affidavit of the above facts, and that he is the person named in the license, and had, before receiving the same, complied with all the requisites as to attendance, terms, and amount of study and examinations required by law and the rules of the university as preliminary to the conferment thereof; that no money was paid for such license except the regular fees paid by all applicants therefor; that no fraud, misrepresentation, or mistake in any material regard was employed by any one or occurred in order that such license should be conferred.

Every license, or if lost a copy, legally certified so as to be admitted as evidence, or a duly attested transcript of the record of its conferment, shall before registration be exhibited to the county clerk, who, only in case it was issued or indorsed as a license under seal by the regents, shall indorse or stamp on it the date and his name preceded by the words, "Registered as author-

Wend., at p. 26 (1840), the method of proving the certificate or license required by the law then in force is considered, as well as the burden of proof of a license, in a suit by a physician for compensation; it also considers the effect wrought by the revision of the law of 1830 (1 R. S., 450, 2d ed., s. 16) and the presumption that a person once licensed has complied with a provision to obtain a renewal. See note 2, p. 389.

Where a physician registered his license with the board of health instead of with the county clerk as required by law, it was held at N. Y. Common Pleas, General Term, that the policy of the statute is to admit a competent physician to practise when, in good faith, he has endeavored to comply with its requirements, and that it was a defence to the action for the penalty for practising without a license to show that since the action was brought he had complied with the law authorizing the validating of a previous imperfect registration. Mayor *v.* Bigelow, 13 Misc., 42 (1895).

[1] Registry is essential to recovery for services rendered as a physician. Accetta *v.* Zupa, 54 App. Div., 33 (2d Dept., 1900), citing Fox *v.* Dixon, 34 N. Y. St. Rep., 710, to same effect, and saying that because the statute makes a violation of the law a misdemeanor, a contract for medical services rendered or to be rendered without compliance with the law is for an illegal consideration and there can be no recovery on it.

Under Act 1880, c. 513 (a predecessor of the present law) a physician who had not filed his certificate could not recover compensation for his services. Fox *v.* Dixon, 34 N. Y. St. R., 710.

[2] In Finch *v.* Gridley's Exr., 25 Wend., 469 (1841), it was held that a physician might maintain an action for medical attendance, although he had neglected to deposit a copy of his license in the clerk's office of the county of his residence.

ity to practise medicine in the clerk's office, —— County." The clerk is required thereupon to give to every physician so registered a transcript of the entries in the register with a certificate under seal that he has filed the prescribed affidavit (*ib.*, s. 149).[1]

A practising physician having registered a lawful authority to practise medicine in one county and removing such practice, or a part thereof, to another county, or regularly engaged in practice or opening an office in another county, must show or send by registered mail to the clerk of such other county his certificate of registration.[2] If such certificate clearly shows that the original registration was of an authority issued under seal by the regents, or if the certificate itself is indorsed by the regents as entitled to registration, the clerk is required thereupon to register the applicant in the latter county, and to stamp or indorse on such certificate the date, and his name preceded by the words, "Registered also in —— County," and return the certificate to the applicant (*ib.*, s. 150).

Evidence—Unauthorized Registration and License. —Every unrevoked certificate[3] and indorsement of registration is presumptive evidence that the person named is legally registered. No person can register any authority to practise medicine unless issued or indorsed as a license by the regents. No such registration is valid unless the authority registered constituted at the time of registration a license under the laws of the State then in force. No diploma or license conferred on a person not actually in attendance at the lectures, institution, and examinations of the school conferring the same, or not possessed, at the time of its conferment, of the requirements then demanded of medical students in this State as a condition of their being

[1] The registry of physicians, kept under sec. 149, is competent evidence to show that a physician is not registered therein and therefore is not authorized to practise in such county. Accetta *v.* Zupa, 54 App. Div., 33 (2d Dept., 1900).

[2] Under c. 513, laws 1880 (a predecessor of the present law), it was held that a physician once registered in the county in the State where he is practising or intends to commence the practice of medicine, is authorized to practise anywhere within the State, and no new registry is necessary to authorize him to visit a patient in any other county of the State. Martino *v.* Kirk, 55 Hun, 474 (1890, 2d Dept.).

Giving two days in a week to practice in another county is not making a new practice in a new county unless intended as a cover for a real change of place. Martino *v.* Kirk, 55 Hun, 474 (1890), 2d Dept.

[3] See note 2, p. 399, and note 2, p. 400.

licensed, and no registration not in accordance with this article, shall be lawful authority to practise, nor shall the degree of doctor of medicine be conferred *causa honoris* or *ad eundum*, nor if previously conferred shall it be a qualification for practice (*ib.*, s. 151).[1]

Exceptions.[2]—The law does not affect commissioned medical officers serving in the United States army, navy, or marine hospital service while so commissioned; or any one while actually serving on the resident medical staff of any legally incorporated hospital; or any legally registered dentist exclusively engaged in the practice of dentistry; or any manufacturer of artificial eyes, limbs, or orthopædic instruments or trusses in fitting such instruments on persons in need thereof; or any lawfully qualified physician in other States or countries meeting legally registered physicians in this State in consultation; or any physician residing on a border of a neighboring State and duly authorized under the laws thereof to practise medicine therein whose practice extends into this State, and who does not open an office or appoint a place to meet patients or receive calls within this State; or any physician duly registered in one county called to attend isolated cases in another county, but not residing or habitually practising therein (*ib.*, s. 152).

Former Practitioners.[3]—The act of 1894, c. 404 (May 3d, 1894), provided for the license within one year thereafter of physicians holding diplomas of date prior to January 1st, 1880, and who had been residents and citizens of the State continuously since June 1st, 1880, on compliance with its provisions.

Honorary Degree of Doctor of Medicine.—The regents of the university may in their discretion confer the honorary degree of doctor of medicine upon such persons, not to exceed four in any one year, as may be recommended to them for that purpose, by the medical society of this State, but such honorary degree shall in no case be a license to practise physic or surgery (Act 1840, c. 366. Heydecker's General Laws, 2d ed., vol. iv., p. 4670.)[4]

Offence—Penalty.—A person who, not being then lawfully authorized to practise medicine[5] within this state and so regis-

[1] See below, p. 401, Honorary Degree.
[2] See note 1, p. 389.
[3] See note 1, p. 388.
[4] See above, title Exceptions.
[5] See note 1, p. 389.

tered according to law, shall practise medicine within this state without lawful registration, or in violation of any provision of this article, or who shall buy, sell, or fraudulently obtain any medical diploma, license, record, or registration, or who shall aid or abet such buying, selling, or fraudulently obtaining, or who shall practise medicine under cover of any medical diploma, license, record or registration, illegally obtained, or signed or issued unlawfully or under fraudulent representations or mistake of fact in a material regard, or who after conviction of a felony shall attempt to practise medicine, or who shall so practise, or shall append "M.D." to his or her name or assume or advertise [1] the title of doctor,[2] or any title which shall show, or tend to show, that the person assuming or advertising the same is a practitioner of any of the branches of medicine, in such manner as to convey the impression that he or she is a legal practitioner of medicine or any of its branches, without having legally received the medical degree, or without having received a license [3] which constituted at that time an authority to practise medicine under the laws of this State then in force, shall be guilty of a misdemeanor [4] punishable with a fine of not more than $250, or imprisonment for six months for the first offence, and for subsequent offences with a fine of not more than $500, or imprisonment for not less than one year, or both fine and imprisonment.[5] To practise medicine under a false or assumed

[1] See note 1, p. 392.
[2] See note 1, p. 388.
[3] See note 1, p. 389.
[4] See note 1, p. 390.
[5] For punishment and rules of evidence applied under former laws see cases cited in note 1, p. 388.

See note 1, p. 389.

Under an indictment under 356 (in 1884) Penal Code for "practising medicine and surgery in this State without being authorized so to do by a license or diploma from some chartered school, State board of medical examiners or medical society," it was held, that it being proved or admitted that defended practised medicine at the time and place charged in the indictment, it was incumbent on him to show that he did so under the protection of a license or diploma. People *v.* Nyce, 34 Hun, 298 (Gen. T. Supr. Ct., 3d Dept., 1884).

The defendant, charged with practising medicine without a license or diploma from some chartered school, State board of medical examiners or medical society, testified that he had received a diploma from the University of Medicine and Surgery in Philadelphia, which diploma was destroyed in the Chicago fire, *held* that evidence of the diploma could not be given, without proof that the university was a chartered school. People *v.* Nyce, 34 Hun, 298.

Where defendant produced a license from the Kansas Eclectic Medical Examining Board, in due form under the law of that State, to show a license from a State board of medical examiners, which, if valid, entitled him to practise in New York (1884), and the prosecution produced and read 24 Kan., 686 (State. *ex rel.* Atty. Gen. *v.* Stormont), which decided

name, or to falsely personate another practitioner of a like or different name, is a felony. The act makes provision, in case of prosecution on complaint of any incorporated medical society of the State, or any county medical society of *such* county entitled to representation in a State society, for the payment of the fines to such society, which is to account to the county treasurer for the excess over the expense of the society in enforcing the medical laws (Act 1893, c. 661, s. 153, as amd. Act 1895, c. 398, s. 1, and Act 1905, c. 455).

INVESTIGATION—PROSECUTION.—When an alleged criminal violation of any provision of this article is brought to the attention of the district attorney of any county, either on the complaint of a State or county medical society or otherwise, he shall cause an investigation and if satisfied that probable cause exists for the belief that such a crime has been committed, he shall cause the prosecution of the alleged offender (*ib.*).

that the Kansas law was unconstitutional, it was error for the court to instruct the jury that as matter of law the defendant had no defence. It was the duty of the court to determine the law of Kansas as a fact, and it could not adopt the case in Kansas as precluding it from examining into the Constitution of Kansas to determine for itself the law of Kansas. People *v.* Nyce, 34 Hun, 298.

Where the indictment did not charge a violation of the law in failing to secure the indorsement or record of the certificate or diploma, the defendant could not be called on to answer that charge, and a conviction erroneous under the indictment as drawn could not be sustained on appeal because it appeared that the diploma relied on by the defendant was not indorsed or recorded. People *v.* Nyce, 34 Hun, 298.

Where a defendant proves a diploma, apparently regular on its face, the burden of impeaching it rests with the people; on grounds of convenience and necessity, the defendant is in the first instance required to prove his license or stand convicted of having none, but having complied with this requirement and removed the difficulty which lies at the foundation of this exceptional rule, he is obliged to go no further than the necessity requires (Landon J. in concurring opinion). People *v.* Nyce, 34 Hun, 298.

Under sec. 356 Penal Code (in 1889) a person practising without a license from some chartered school, State board of medical examiners or medical society was guilty, although he had practised since 1858, and had received a medical education at two German universities; a certificate of limited study is not the license required by the law. People *v.* Fulda, 52 Hun, 65.

When the fact of practice is proved the burden is on the defendant to show the license. People *v.* Fulda, 52 Hun, 65.

On form and sufficiency of complaint, under analogous veterinary law, see County of Steuben *v.* Wood, 24 A. D., 442, holding that as the action is highly penal, the rules of pleading should not be relaxed, and that a complaint which alleged that at a time and place mentioned the defendant practised veterinary medicine in violation of the statute, did not state *facts*, but a legal conclusion.

Mayor *v.* Bigelow, 13 Misc., 42, contains an opinion by Judge Roger A. Pryor showing the application of the principles of construction to the penal provisions of this law.

Intoxicated Physician.—A physician or surgeon, or person practising as such, who, being in a state of intoxication, without a design to effect death, administers a poisonous drug or medicine, or does any other act as a physician or surgeon, to another person, which produces the death of the latter, is guilty of manslaughter in the second degree (Penal Code, s. 200).

A physician or surgeon, or person practising as such, who, being in a state of intoxication, administers any poison, drug or medicine, or does any other act, as a physician and surgeon, to another person, by which the life of the latter is endangered, or his health seriously affected is guilty of a misdemeanor (Penal Code, s. 357).

Surgeon at Duel.—A person present as surgeon at the time appointed for a duel or combat with deadly weapons, or when such duel or combat is fought, is punishable by imprisonment for not more than seven years (Penal Code, s. 235).

Definitions.—As used in the article, university means the University of the State of New York. Medical school means any medical school, college, or department of a university registered by the regents as maintaining a proper medical standard and as legally incorporated. Medicine means medicine and surgery;[1] physician[2] means physician and surgeon (Act 1893, c. 661, definitions).

Fees.—To regents, for examination, $25 (*ib.*, s. 145, as amended Act 1896, c. 111, s. 1).

In case of failure, second examination after six months' study without additional fee (*ib.*, s. 147).

To regents, for license without examination under section 148, $10 (*ib.*, s. 148).

To county clerk, for registering affidavit and certificate, $1 (*ib.*, s. 149).

To county clerk, for registration in an additional county, 25 cents (*ib.*, s. 150).

[1] See n. 1, p. 389.

[2] There is a distinction between a practitioner of physic and an apothecary. Allcott *v.* Barber, 1 Wend., 525 (1828).

Where the same person officiates both as physician and apothecary, he comes within the decision that an unlicensed practitioner is incapable of suing for services rendered or medicines furnished as a physician. Allcott *v.* Barber, 1 Wend., 525 (1828). See note 1, p. 392.

North Carolina.

See Appendix, p. 698.

Board of Medical Examiners.—The board of medical examiners of the State consists of regularly graduated physicians appointed by the medical society of the State [1] (Code 1883, ss. 3,123, 3,126).

Prohibition.[2]—No person can lawfully practise medicine

[1] The courts have held that of the many schools of *medicine and surgery*, the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different systems—allopathic, homœopathic, Thompsonian, and the like—should be examined upon a course, such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school should be upon the Board of Examiners. State *v.* Biggs, 133 N. C., 723.

The medical society are allopaths, and would not recognize nor license an osteopath; if they would not, and the court should hold it indictable to practise osteopathy without a license, it would be a judicial prohibition upon that phase of healing. State *v.* McKnight, 131 N. C., 717. The court cites with approval Smith *v.* Lane, 31 N. Y., 632; State *v.* Leffring, 61 Ohio St., 39; 46 L. R. A., 334; Nelson *v.* State Board of Health, 22 Ky., 438, 50 L. R. A., 383, and determines that the practice of *osteopathy* is not the practice of medicine or surgery, as commonly understood, and therefore (as the law stood in 1902, before the amendment of 1903, c. 697) it was not necessary for a practitioner of osteopathy to have a license from the Board of Medical Examiners before practising it.

To limit treatment to allopathy would be to limit progress by establishing that as a State system, and might be establishing a monopoly, which would be unconstitutional. State *v.* McKnight, 131 N. C., 717 (see State *v.* Biggs, note 2, *infra*).

[2] On the limits of the legislative power, in regulating the practice of medicine and surgery, see State *v.* Biggs, 133 N. C., 723. It extends to protecting the public against unfit members of that profession, and the prohibition of any pretended art of healing, which is calculated to deceive and injure the public, and to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practise it. But the police power does not extend to requiring a practitioner to show a proficiency in medicine and surgery in cases in which the practitioner, not professing to be a practitioner of medicine or surgery, and not deceiving or injuring the public and not being ignorant or incompetent to the detriment of the public, in the application of the methods he uses, merely: (1) administers massage, baths, and physical culture; (2) manipulates muscles, bones, spine, and solar plexus; (3) kneads the muscles with the fingers of the hand; and (4) advises patients what to eat and what not. State *v.* Biggs, 133 N. C., 723.

The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual or unnecessary restrictions upon lawful occupations. Its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts. State *v.* Biggs, 133 N. C., 723.

All the law has done or can do is to require that those practising on the sick with knife and drugs shall be examined and found competent by those of like faith and order. State *v.* Biggs, 133 N. C., 723.

or surgery,[1] or any of the branches thereof, nor in any case prescribe for the cure of disease[2] for a fee or reward[3] unless he shall

[1] What is the *practice of medicine and surgery* is as well understood, and its limits, as the practice of dentistry. State *v.* Biggs, 133 N. C., 723.

A person who advertised and practised as Dr. Harry A. McKnight, who administered no drugs or medicines, who manipulated, kneaded, flexed, and rubbed the body of his patients, and applied hot and cold baths, and prescribed rules of diet and exercise, and practised osteopathy, hypnotism, and suggestion under hypnotism, and who was a graduate of a college of osteopathy duly incorporated, but who was not licensed to practise medicine or surgery or any of their branches, nor to prescribe for the cure of diseases for fee or reward, and who charged a fee, and twice used a surgeon's knife to open an abscess in a patient's mouth, but who did not charge for that service, was not guilty under Laws 1889, c. 181, amending 1845, c. 117, and code sec. 3,132. State *v.* McKnight, 131 N. C., 717 (see State *v.* Biggs, note 3 *infra*, for the determination of the court that the Act of 1903, c. 697, attempting to bring osteopaths within the law was unconstitutional as creating a monopoly, and declining to consider whether it unduly discriminated against osteopaths).

He does not practise medicine and surgery who does not use drugs, medicine, nor surgery. State *v.* McKnight, 131 N. C., 717.

Where surgery was practised as a charity, without fee or reward, and incidentally and not in the usual course of practice, the practitioner though not licensed did not violate the law. State *v.* McKnight, 131 N. C., 717. See note 2, p. 405.

[2] "Practice of medicine and surgery" is not coëxtensive with "treatment of diseases" and cannot be made so unless "surgery and medicine" are adopted as the State system of treatment, a monopoly, and all other methods are made indictable. State *v.* Biggs, 133 N. C., 723.

The State Medical Society was incorporated by c. 258, Act 1858–59, and the act provided for examination and licenses, but the only penalty till 1885 was that the unlicensed practitioner could not recover compensation in the courts. State *v.* Biggs, 133 N. C., 729 (1903).

An interesting discussion of the various views of what constitutes quackery, quoting Bishop Warburton's "orthodoxy is my doxy, heterodoxy is the other man's doxy" will be found in *State v. Biggs*, ending with the proposition that this is a free country, and any man has a right to be treated by any system he chooses, and the law cannot decide that any one system shall be the system he shall use; if he gets improper treatment for his children, it is for a jury of his peers to decide, not a matter of law to be prescribed by a judge or legislature.

On the antiquity of the *practice of medicine and surgery*, see State *v.* Biggs.

The case of State *v.* Biggs is most interesting as substantially the only case which directly considers the outside limits of the legislative power in prescribing the qualifications of those who treat the sick for pay. It is very recent (decided December 18th, 1903), and if its principles are applied in other States it will lead to the determination that the laws of other States are unconstitutional whose legislatures have in effect prescribed that all persons who treat the sick for pay must pass an examination in medicine and surgery (see Ill., Ohio, So. Dak.). The opinion was written by Chief Justice Clark and appears to be his individual opinion only, as Justices Walker and Connor concurred in the result only, and Justices Douglass and Montgomery, the remaining justices of the court, did not take part in the decision.

[3] The legislature could not restrict the cure of the body to the practice of medicine and surgery, or establish any State system of healing. State *v.* Biggs, 133 N. C., 729, citing State *v.* McKnight, 131 N. C., 723.

Prior to 1903 those who had faith in treatment by methods not included

have been first licensed [1] (Code 1883, s. 3,122,[2] as amended Act of 1885, c. 117, s. 1).[3]

DEFINITION—OSTEOPATHY—PRAYER—(held unconstitutional in State *v.* Biggs; see notes below).—"Practice of medicine" [4]

in the *practice of medicine and surgery* as usually understood had the right to practise their faith and be treated if they chose by those who openly and avowedly did not use either surgery or drugs in the treatment of disease, and the legislature could not under the Constitution restrict all healing to any one school of thought or practice. State *v.* Biggs, 133 N. C., 723 (1903).

Patients have a right to use such methods as do not require much skill and learning, if they wish, and the attempt to require an examination of the character above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. State *v.* Biggs, 133 N. C., 723. (See this case for a discussion of the effect of such legislation as creating a monopoly and prohibiting the use of simple remedies.)

It is not competent for a legislature to deny mankind any relief from pain and suffering except at the hands of a particular school of medical thought, even though it be the best. That is a matter which must be decided by those who seek, and must pay for relief; not by the M.D.'s themselves nor by the courts. State *v.* Biggs, 133 N. C., 723.

[1] The law-making power of the State has the right to require an examination and certificate as to the competency of persons desiring to practise law or medicine. State *v.* Call, 121 N. C., 643.

To require this is an exercise of the police power for the protection of the public against incompetents and impostors, and is in no sense the creation of a monopoly or special privileges. State *v.* Call, 121 N. C., 643.

[2] In State *v.* Call, 121 N. C., 644, the court held that code secs. 3,122, 3,132, as amended Act 1885, c. 117, 261, Act 1889, c. 181, ss. 4, 5, Act 1891, c. 420, did not violate Art. I., s. 7, of the State Constitution forbidding exclusive privileges and emoluments to any set of men; nor sec. 31 of the same article, forbidding monopolies and perpetuities; nor the 14th Amdt., U. S. Const., prohibiting any State to deny to any person the equal protection of the laws (cf. State *v.* Biggs, *supra* n. 2, p. 405, notes 2 and 3, p. 406, showing that Act 1903, c. 697, does violate the State Constitution).

Section 3,122 is a reënactment of Act 1852, c. 258, s. 2. Puckett *v.* Alexander, 102 N. C., 95.

[3] In State *v.* Call, 121 N. C., 646, the act of 1885, c. 117, was upheld, not without great hesitation, solely on the ground that it was an exercise of the police power for the protection of the public against incompetents and impostors, and in no sense the creation of a monopoly or special privilege. State *v.* Biggs, 133 N. C., 729.

[4] See n. 2, p. 405, notes 2 and 3, p. 406.

The act of 1903, c. 697, amending sec. 3,122, in defining how the expression "practice of medicine and surgery" should be construed, in effect enacted that it should mean practice without medicine or surgery if a fee should be charged; if no fee is charged, then they drop back to their normal meaning. There is no protection to the public in this, but unless the act protects, and is intended solely to confer protection on the public it is invalid, for the legislature cannot forbid one man to practise a calling or profession for the benefit or profit of another. State *v.* Biggs, 133 N. C., 723.

In State *v.* Biggs, 133 N. C., 723, after showing how the Act of 1903, c. 697, would operate to bar dentists, aurists, oculists, corn doctors, old women, herb doctors, and even an attempt to dissipate an attack of the blues, for a fee, unless they had passed an examination in the prescribed subjects, the chief justice said that this is creating a monopoly because it enacted that diseases should

means the management or treatment[1] for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs,[2] surgical operation, surgical or mechanical appliances, or by any other method whatsoever, provided that this shall not apply to midwives nor to nurses; provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to wit, the osteopaths,[3] shall be examined *only*[4] upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics, and physical diagnosis, provided this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means (Act 1903, c. 697).

be not cured, if for a fee, without the examinations; that such an examination was proper for a person who holds himself out as an M.D.; that it was not requisite that a person who treated a diseased ear should be proficient in obstetrics, nor that an oculist should be a chemist, nor one who removes corns or plugs teeth a proficient in *materia medica*, nor one who applies a fomentation, forced to pass in therapeutics, nor that one who sells herb tea for the stomach-ache should be scientifically versed in pathology and physiology; that the act is too sweeping; the legislature could no more enact that the practice of medicine and surgery shall mean practice without medicine and surgery than it could provide that two and two make five, because it cannot change a physical fact. And *when it forbade all treatment of diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M.D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution.*

Where an offence is prohibited in general terms in one section, and in another and distinct section the acts of which the offence consists are specified, it is not necessary that anything but the general description should be set out in the indictment. State *v.* Van Doran, 109 N. C., 684.

[1] See n. 2, p. 405, notes 2 and 3, p. 406.

[2] Medicine is an experimental, not an exact science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, *but it cannot forbid dispensing with them.* State *v.* Biggs, 133 N. C., 723.

[3] The legislature, if it see fit, may require an examination and license of osteopaths, by learned osteopaths, "but certainly the examination would be on subjects appropriate to secure competency therein, *and not on an entirely different course of learning, such as that prescribed for applicants to practise medicine or surgery.*" State *v.* McKnight, 131 N. C., 717. (*Cf.* this with the Act of 1903, c. 697, which, as shown in State *v.* Biggs, requires an examination for osteopaths which omits the subjects by them deemed important.)

Osteopathy approximates nursing in many respects (though different in others), as the latter is now taught as a profession. State *v.* McKnight, 131 N. C., 717.

[4] In State *v.* Biggs, 133 N. C., 723, the court calls attention to the curious fact that though, in the act of 1903, c. 697, osteopaths are required to pass examinations in several branches that regu-

EXAMINATION—LICENSE.—The board must examine[1] all applicants for a license to practise medicine or surgery, or any of the branches thereof,[2] who shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college in good standing requiring an attendance of not less than three years and supplying such facilities for clinical instruction as shall meet the approval of the said board, on anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, materia medica, therapeutics, obstetrics, and the practice of medicine, and grant to a competent applicant[3] a license or diploma authorizing him to practise medicine and surgery or any of the branches thereof, provided that the requirement of three years' attendance shall not apply to those graduating prior to January 1st, 1900; provided further that license or other satisfactory evidence of standing as a legal practitioner in another State shall be accepted in lieu of a diploma and entitle to an examination (*ib.*, s. 3,124, as amended Laws 1899, c. 93, s. 1).

lar students are not required to be examined upon, viz.: histology, urinalysis and toxicology, regional anatomy, bacteriology, gynecology, and physical diagnosis, still, curiously enough, they are not required to pass any examination in the principles of osteopathy, osteopathic manipulations, and osteopathic diagnosis. The court declines to consider whether this discrimination against osteopaths makes the law unconstitutional. See notes, pp. 407, 408, *supra*.

[1] The power of the legislature to require examination and certificate as to competency of persons desiring to practise professions is upheld in State *v.* Call, 121 N. C., 643; State *v.* McKnight, 131 N. C., 717, 59 L. R. A., 187; Ewbank *v.* Turner, 134 N. C., 77 (the latter case distinguishing State *v.* Biggs, 133 N. C., 729).

An act to protect the public against imposition to health by requiring that persons who engage in the practice of medicine shall submit to an examination conducted by learned physicians, and shall produce a license from such competent masters of the medical science, is constitutional. State *v.* Van Doran, 109 N. C., 864.

[2] Dentistry is not the practice of medicine or surgery, but a related profession, and so is pharmacy. State *v.* McKnight, 131 N. C., 717.

Obstetrics is a branch of the practice of medicine and surgery. State *v.* Welch, 129 N. C., 579.

[3] The granting of a certificate to practise *dentistry* involves matters of judgment and discretion and will not be enforced by mandamus. Ewbank *v.* Turner, 134 N. C., 77.

In Ewbank *v.* Turner, 134 N. C., 77 (a case arising under the dental law) the court, after denying the power of the courts, by mandamus, to compel the issuance of a certificate to one whom the board after examination determines it has not found proficient, discusses the remedies for arbitrary action by the board, and states that they either lie with the legislature or in further preparation and a new examination by the candidate, or an action for damages against the individual members of the board.

In no aspect can the examination papers of other applicants be introduced in evidence, since it does not hurt one applicant, if others who are not proficient are admitted to practice; therefore it is no error to refuse a rejected applicant permission to inspect the papers of successful candidates. Ewbank *v.* Turner, 134 N. C., 77.

Temporary License.—Where he has not been refused a license by the board, two members of the board may grant a temporary license to any applicant who shall comply with the requirements as to graduation prescribed in section 3,124 as amended, to continue in force no longer than the next regular meeting of the board (*ib.*, s. 3,125, as amended Act of 1889, c. 181, s. 3, as amended Act 1899, c. 93, s. 2).

Meetings of the Board.—The board of examiners must assemble when and where the medical society assembles, which society must assemble at least once a year; the board must remain in session from day to day till all applicants during the first five days after its meeting have been examined and disposed of, provided that said board may meet in its discretion, not more than one week before the society, but always in the same place, and one additional meeting in each year may be held at some suitable point in the State if deemed advisable (*ib.*, s. 3,127 as amended Act 1899, c. 93, s. 3).

Penalty,[1] Exceptions.[2]—A person practising[3] without ob-

[1] There might be a classification which would be a violation of the 14th Amdt. U. S. Const., but a classification of physicians practising before the act, and those beginning thereafter and distinguishing those having the diplomas of a medical college and those not, have been held to be reasonable and within the legislative discretion. State *v.* Call, 121 N. C., 643, citing State *v.* Dent, 25 W. Va., 1; 129 U. S., 114; *ex parte* Spinney, 10 Nev., 328; West *v.* Clutter, 37 Ohio, 347; People *v.* Phippin, 70 Mich., 25; Hewitt *v.* Charier, 16 Pick (Mass.), 356; State *v.* Medical Board, 32 Minn., 324; State *v.* Randolph, 17 L. R. A.

[2] The Act of 1889 requires a registration and certificate which is not exacted by Act of 1885, and where an indictment charged an offence under Act of 1885, but a special verdict failed to find facts sufficient to constitute that offence, while the special verdict found facts sufficient to constitute an offence under Act of 1889, but the indictment was insufficient under that act, a judgment of conviction was arrested in State *v.* Call.

[3] The court knows nothing judicially of the contention that osteopathy is an imposition. State *v.* McKnight. The very fact that it is complained it does not use drugs or surgery shows that its practitioners do not violate the law (1902). An appeal to the imagination is an ingredient of all systems of healing. The aim of medical science is to assist nature, and osteopathy proposes to do that by other methods than medicines and surgery (State *v.* McKnight, 131 N. C., 717). See n. 1, p. 405; n. 1, p. 406.

It is no violation of law to advertise as doctor; there are many kinds of doctor (laws, divinity, physics, veterinary, etc.), and the defendant had a diploma conferring upon him the title Doctor of Osteopathy. Courts cannot abate a man as a nuisance because some one gives him or he gives himself a title. State *v.* McKnight, 131 N. C., 717.

An indictment charging that defendant did practise or attempt to practise medicine or surgery is not defective because of the disjunctive conjunction. State *v.* Van Doran, 109 N. C., 864 (Shepherd, J., however, dissenting).

It is not essential that the prosecution shall show that the defendant ever prescribed for or practised upon

taining a license [1] from the board shall not be entitled to sue for or recover any medical bill for services; [2] and a person who has begun the practice of medicine or surgery [3] in the State for a fee or reward since February 23d, 1885, without first obtaining such a license, shall in addition be guilty of a misdemeanor and punishable with a fine of from $25 to $100, or imprisonment at the discretion of the court for each offence; but the act does not apply to women pursuing the avocation of midwife,[4] nor to any reputa-

a particular patient; it would be sufficient to prove that he held himself out to the public as a physician or surgeon, and invited or solicited professional employment from any who might need or desire such service. State *v.* Van Doran, 109 N. C., 864. See note 1, p. 357.

An unlicensed physician who has prescribed for a patient cannot escape the penalty of the law by showing that the medicine was a proprietary remedy made and sold by him. State *v.* Van Doran, 109 N. C., 864.

A vender of patent medicines who does not pretend to diagnose disease and determine which of his remedies is proper in a particular case is not a violator of this statute; but that avocation cannot be used to shelter one who is practising medicine and holding himself out as a physician, and who varies his prescriptions to meet symptoms discovered on his own examination. State *v.* Van Doran, 109 N. C., 864.

[1] On form of indictment, see State *v.* Call, 121 N. C., 643; State *v.* Van Doran, 109 N. C., 864; State *v.* Welch, 129 N. C., 579.

It is not necessary to insert in an indictment a negative that the defendant does not belong to one of the classes named in the proviso to sec. 5, c. 181, Act 1889, as its insertion is not required to charge the offence, for the proviso merely withdraws certain cases from its operation. State *v.* Call, 121 N. C., 643.

It would be otherwise if the negation, even if it had been contained in a proviso, was necessary to constitute the offence, as was the essential averment that the practising of medicine was without the registration and certificate required by law. State *v.* Call, 121 N. C., 643.

[2] In 1883 the performance of medical services for fee or reward without a license was absolutely prohibited, even though the practitioner was the holder of a diploma from a regular medical college; and the Act of 1885, c. 261, amending s. 3,132 of the Code by excepting holders of diploma from a regular medical college prior to January 1st, 1880, could not give a cause of action for services, where none existed at the time of its enactment. Puckett *v.* Alexander, 102 N. C., 95.

A promise to pay an unlicensed physician for services which he is forbidden by law to render, creates no obligation and gives no right of recovery. Puckett *v.* Alexander, 102 N. C., 95.

The law implies a promise to pay to a physician for his professional service; what they are reasonably worth. Prince *v.* McRae, 84 N. C., 674.

[3] A statute requiring examination and license before beginning the practice of medicine or surgery neither regulates nor forbids any mode of treatment which absolutely excludes medicines and surgery from its pathology. State *v.* McKnight, 131 N. C., 717.

[4] Where a proviso, instead of constituting a part of an offence, withdraws a certain class of persons from the operation of a law (*e.g.*, midwives), it is not necessary, in an indictment for violating the law, to negative the proviso by showing that the accused does not belong to the excepted class. The exception, if the defendant belongs to it, is matter of defence. State *v.* Welch, 129 N. C., 579 (1901).

ble physician or surgeon residing in a neighboring State,[1] coming into this State for consultation with a registered physician resident therein, except a physician residing in a neighboring State regularly practising in this State, nor does it apply to physicians who have a diploma from a regular medical college prior to January 1st, 1880[2] (*ib.*, s. 3,132,[3] as amended Act of 1885, c. 117, s. 2;[4] Act of 1885, c. 261, s. 1; Act of 1889, c. 181, s. 1).

To practise[5] without registration and a certificate[6] is a misdemeanor punishable with a fine of from $25 to $100 or imprisonment for each offence, but this act does not apply to women pursuing the avocation of midwife nor to reputable physicians or surgeons residing in a neighboring State coming into the State for consultation with a registered physician of this State (Act of 1889, c. 181, s. 5).[7]

Rescission of License.—The board may rescind a license upon satisfactory proof that a licensee has been guilty of grossly immoral conduct (*ib.*, s. 3,133).

Qualification.—[*Every person practising medicine or surgery in the State was required before January 1st, 1892, to appear personally before the clerk of the superior court of the county where he resided or practised, for registration,*[8] *and*] all persons beginning to practise are [*likewise*] to appear and register within thirty days after obtaining a license (Act of 1889, c. 181, s. 3, as amended Act of 1891, c. 90) (also amended in 1899 by c. 93, s. 4, but by

[1] A comity extended to reputable physicians coming from other States is not an attempt to grant the exclusive privileges forbidden by Art. 1, s. 7, Const. N. C. State *v.* Van Doran, 109 N. C., 864.

[2] It is not unreasonable for a statute to be passed requiring the examination of those not then in practice, and permitting those then in practice to continue without an examination. It was also competent for a later statute to recognize and provide that those who were not required to submit to examination under the earlier statute, because in practice at the time of its enactment, should continue in practice without examination after the passage of the later law. State *v.* Call, 121 N. C., 643. See note 1, p. 410.

[3] See note 2, p. 407.

[4] Sec. 5, c. 181, Act 1889 does not repeal sec. 2, c. 117, Act 1885, and the defendant could have been indicted under either act. State *v.* Call, 121 N. C., 643.

[5] The statute of 1889, c. 181, s. 5, did not make practising for fee or reward part of the offence; therefore it was not necessary in an indictment under that law to allege that the alleged unlawful practice was for fee or reward. State *v.* Welch, 129 N. C., 579 (1901).

If the defendant held himself out to the public as a physician or surgeon, he was guilty of the offence created by the statute; it is therefore not necessary that the indictment should designate the person upon whom the defendant practised medicine or surgery. State *v.* Van Doran, 109 N. C., 864.

[6] See note 1, p. 411.

[7] See n. 4, p. 407; n. 4, *supra.*

[8] See note 1, p. 410; n. 2, *supra.*

reason of an apparent typographical error the force of the amendment is not clear; its probable design was to strike out the words in italics above).

Any person applying for registration must produce and exhibit before the clerk a license from the board of medical examiners [*or make oath that he was practising medicine or surgery in this State prior to March 7th, 1885*],[1] and thereupon the clerk shall register the date, with the name and residence of the applicant, and shall issue a certificate of registration. The certificate entitles the recipient to practise in any county in the State, but if he removes his residence to another county he must exhibit his certificate to the clerk of such county and be registered. Persons having a temporary license are not entitled to register, but may practise so long as the license is in force (Act of 1889, c. 181, s. 4, as amended Act of 1891, c. 420; also amended in 1899 by c. 93, s. 4, but by reason of an apparent typographical error the force of the amendment is not clear; its probable design was to strike out the words in italics above).

[License Fee.—A license of $10 for each county in which he carries on business is exacted from every (itinerant?) medical practitioner, one-half for the use of the county and one-half for the use of the State; but a State license may be obtained from the State treasurer for $30 good for twelve months, and he is then exempt from the portion of above tax due the State (Act 1891, c. 323).

(Note.—This provision is not expressly repealed by Act 1899, c. 11, nor by Act 1901, c. 9, but it is probably repealed in effect.)]

Tax.—On each and every practising physician there is a State tax of $5 annually. No city, town, or county shall levy any additional license tax on physicians. (Act 1901, c. 9, s. 37, not expressly repealing, but apparently superseding Act 1899, c. 11, imposing a similar tax.)

Offence, Penalty.—Practising the profession without having paid the tax and obtained a license as required by the tax law (Act 1901, c. 9) is a misdemeanor, punishable by fine or imprisonment and an additional penalty of $50, recoverable by

[1] Since the Act 1891, c. 420, the fact of a diploma issued by a regular medical college prior to March 7th, 1885, will no longer authorize the registration. State *v.* Call, 121 N. C., 643.

the sheriff of the county in which it has occurred before a justice of the peace of the county for the benefit of the school fund (*ib.*, s. 103).

Fees.—To the secretary of the board, before issuing a license or diploma, $10.

To the secretary of the board, for temporary license, $5 (Code, 3,130).

To clerk of the court, for registration and certificate, 25 cents.

To clerk of the county, for registration on removal, no fee (Act 1889, c. 181, s. 4). (See Appendix, p. 698.)

North Dakota.

Board of Examiners.—The governor appoints a State board of examiners of nine members, eight of whom are practising physicians, graduates of reputable medical colleges. Two members shall be homœopathic physicians and one a lawyer (Pol. Code, s. 275, Rev. Codes, 1899, p. 127). The president and secretary have power to administer oaths.

The board must hold meetings for examination at such place as it may designate, on the first Tuesday of January, April, July, and October of each year, and such special meetings as it may appoint, and must keep a record of its proceedings and a register of applicants for a license, with their ages, the time spent in the study of medicine, and the name and location of all institutions granting to such applicants degrees or certificates of attendance on lectures in medicine or surgery, and whether the applicant was rejected or licensed under this article; and said books and register shall be *prima facie* evidence of all matters therein recorded (*ib.*, s. 276).

Qualification—Examination—Refusal—Revocation.—All persons before commencing the practice of medicine, surgery, or obstetrics shall apply to the board for a license, and shall be examined in anatomy, physiology, chemistry, histology, materia medica, therapeutics, diseases of women and children, of the nervous system, of the eye and ear, medical jurisprudence, and such other branches as the board deems advisable, and present evidence of having attended three courses of lectures of at least six months each; the examination must be practical and scientific, and sufficient to test the candidate's fitness to

practise medicine, surgery, and obstetrics. If the applicant passes the prescribed examination the board must grant him a license to practise medicine, surgery, and obstetrics. The board may revoke or refuse a license for dishonorable or immoral conduct, chronic or persistent inebriety, or the practice of criminal abortion. In complaints for violating the provisions of this section, the accused shall be furnished with a copy of the complaint, and given a hearing before the board in person or by attorney (*ib.*, s. 277).

RECORDING.—The person receiving a license must file it, for record, with the register of deeds of the county wherein he resides, and the register shall record it in like manner as other instruments required to be recorded (*ib.*, s. 278, as amd. Act 1901, c. 142).

EXCEPTIONS.—The article does not apply to surgeons of the United States army or navy, to physicians or surgeons in actual consultation from other States or Territories, or to actual medical students practising medicine under the direct supervision of a preceptor (*ib.*, s. 279).

PENALTY.—Violating the provisions of the article is a misdemeanor, punishable with a fine of from $50 to $100, or imprisonment in a county jail not exceeding thirty days, or both (*ib.*, s. 280).

FEE.—To the board, for examination, $20 (*ib.*, s. 277).

OSTEOPATHY.—A person having a diploma regularly issued by the American School of Osteopathy of Kirksville, Missouri, or any other legally chartered and regularly conducted school of osteopathy, who shall have been in personal attendance as student in such school for at least four terms of not less than five months each before graduation, shall be authorized to treat diseases of the human body according to such system, after having filed such diploma for record with the clerk of the county court of the county in which he proposes to practise, and having filed with such clerk an affidavit that the diploma is genuine, and that he or she is the person to whom the same was issued, and that all the provisions of this article were fully complied with before the issuing of such diploma; the clerk shall record the diploma and indorse on it the date of filing and recording, and shall receive a fee of $1. (Pol. Code, s. 301*a*, Rev. Codes, 1899, Pol. Code, ch. 4, art. 9.)

Osteopathy—Penalty.—Practising, or pretending or attempting to practise the system, method, or science of osteopathy in treating diseases of the human body without having complied with this section is a misdemeanor, punishable by a fine of from $50 to $100 for each offence; but this section does not prohibit any legally authorized practitioner of medicine or surgery in the State from curing or relieving disease with or without drugs, or by any manipulation by which any disease may be cured or alleviated (*ib.*, s. 301, *a*).

Ohio.[1]

State Board of Medical Registration and Examina-

[1] The brief of counsel for the State, in State *v.* Gravett, 65 Ohio St., 289, traces the history of legislation regulating the practice of medicine in the American colonies and in the State of Ohio. It states that the earliest colonial law relative to medicine, of which there is any record, was an act to regulate charges of physicians, passed in Maryland in 1638; that a law of Massachusetts, passed in 1649, forbade any one except those skilful in the art to be employed at any time about the bodies of men, women, or children, for preservation of life or health, as chirurgians, midwives, physicians; that this law was substantially adopted in New York in the Duke of York's grant of 1665, and later followed in the other colonies. The evolution of the Ohio Statutes on this subject (beginning with 1811) is indicated at length in this brief, which also discusses the differences between physicians, surgeons, and midwives.

Where a pursuit concerns in a direct manner the public health and welfare, and is of such a character as to require a special course of study or training or experience to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the General Assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance (citing State *v.* Gardner, 58 Ohio St., 599). In the enactment of legislation of this character, the General Assembly may take account of the advance of learning, and provide for the public health and safety by such reasonable and proper measures as increased knowledge may suggest; and to make such legislation effective, one having an established practice and one contemplating practising may be required to conform to the same standard of qualification. State *v.* Gravett, 65 Ohio St., 289.

Authority to discriminate against osteopathy would imply authority (in the legislature) to discriminate against any other school of medicine. Discrimination against osteopathists is unwarrantable, and compliance with legislation which requires of osteopathists a college education which is not demanded of applicants from other schools of medicine cannot be required. Consequently the amendment to sec. 4,403, *f*, effected by Act April 14th, 1900, which required a four years' course in a school of osteopathy from osteopathic applicants, and merely required applicants from other schools of medicine to have a diploma, without specifying the length of the course, was invalid. State *v.* Gravett, 65 Ohio St., 289. (The opinion does not state precisely the ground on which it denies the power to the legislature.)

The purpose of the law is the protection of the public health and the safety of the lives of the people of the State. Kowenstrot *v.* State, 4 Ohio N. P., 257; 6 Ohio Dec., 467—rev'd for error in admission of testi-

TION.—The State board of medical registration and examination [1] consists of seven members, physicians in good standing in their profession, representing as nearly as possible schools of practice [2] in the State in proportion to their numerical strength in the State, but no one school to have a majority of the whole board (Rev. 1897, s. 4,403. Bates Annotated Ohio Stats., 4th ed., 1904, s. 4,403). [See below, title OSTEOPATHIC EXAMINING COMMITTEE.] The president and secretary of the board have power to administer oaths.

RECORD, REGISTER OF BOARD.—The board shall keep a record of its proceedings and a register of all applicants for certificates, giving name and location of the institution granting the applicant the degree of doctor of medicine or surgery, and also whether the applicant was rejected or certificate granted, and the books and register are *prima facie* evidence of all matters recorded therein (*ib.*).

OFFENCE, PENALTY.—Engaging in the practice of medicine and surgery [3] under and by virtue of a diploma, certificate, writing, or document representing the holder to be a graduate of any educational institution of medicine whatsoever, unless he shall

mony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

In applying the cases cited in the notes it is always to be remembered that this act has been frequently amended, and that subsequent amendments have in some instances rendered the previous decision inapplicable. This is peculiarly true of the decisions construing *other agency* in the definition in the Act of 1896. *Other agency* is omitted and a much more comprehensive definition substituted. The decisions construing the earlier definition are therefore not to be relied on as a proper construction of the present definition; *cf.* n. 5, p. 428.

A law depriving persons not members of medical societies, nor licensed, of the aid of the law in the collection of compensation for medical services, making such contracts void, and imposing a fine for practising for pay is a constitutional and valid enactment. Nichols *v.* Poulson, 6 Ohio, 306 (1834), citing to same effect, 4 Ohio, 309.

[1] It is for the legislature to determine the forum to ascertain one's fitness to practise medicine. Kowenstrot *v.* State, 6 Ohio Dec., 467; 4 Ohio N. P. Rep., 257—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

[2] It could not be maintained that the board of medical examination must be so numerous that it may have a member of every existing or possible school. State *v.* Gravett, 65 Ohio St., 289.

In State *v.* Leffring, 61 Ohio St., 39, it is intimated that the legislature has no power to determine a question of science or to control the personal conduct of citizens without regard to their opinions in a matter in which the public is in nowise concerned.

[3] There is no provision of the Act of 1896 (as it stood in 1899) indicating a legislative intent that those who do not propose to practise *medicine* shall graduate from a college of medicine or otherwise become learned in its use. State *v.* Leffring, 61 Ohio St., 39.

in fact have attended a complete course of instruction in such institution, equal to the average course in other institutions in the State where the various branches of medicine are taught as a science, shall be punishable with a fine from $100 to $1,000, or imprisonment one to three years, or both, in the discretion of the court (*ib.*, s. 4,403, *a*, *b*).

[The law defines other offences connected with issuing, etc., such certificates, not within the scope of this abstract.]

QUALIFICATION.[1]—No person[2] shall[3] practise[4] medicine,[5] surgery, or midwifery[6] in any of its branches without first complying with this act (Act April 14th, 1900, p. 197, amending s. 4,403, *c*, Rev. 1897).[7]

[1] Under sec. 4,403, *c* (Act 1896, February 27th), three classes of persons, on application and compliance with the conditions prescribed for their class, are entitled to receive from the board certificates, which, when left with the probate judge of the proper county, are conclusive evidence of the right to practise medicine: (1) Graduates in medicine from legally chartered medical institutions of the prescribed standing, upon presentation of their diplomas with proof of their identity, are entitled to receive a certificate unless it be refused on grounds applying to all classes, and relating to the character or habits of the applicant; (2) legal practitioners of medicine February 27th, 1896, but not graduates in medicine or surgery, may furnish the board an affidavit stating the periods during which and the places at which they have practised, and the board, if satisfied from such affidavits and from other information which they may receive of the truth of the affidavits, shall issue the certificates; (3) persons engaged in the practice of medicine, but neither legal practitioners nor graduates in medicine or surgery, may present themselves before the board and submit to examination touching their qualifications for the practice of medicine or surgery; and the board, if the examination be satisfactory to it, shall issue the prescribed certificate. State *v.* Ohio State Med. Board, 60 Ohio St., 21.

[2] The purpose is to prevent those from engaging in the practice of that profession who, from lack of proper knowledge or want of moral rectitude, are unfit to be entrusted with its important and responsible duties. France *v.* State, 57 Ohio St., 1.

The legislature has the right to define the classes of persons to become subject to the restrictions imposed, in order to effectuate the object to be attained. Evans *v.* State, 6 Ohio N. P., 129; 9 Ohio Dec., 222.

Sec. 4,403 makes provision as to those who shall not practise, and thereby in effect allows all persons not excluded thereby, or by other statutes of the State, to do so. State *ex rel.* Baldwin *v.* Prendergast, 8 Ohio C. C., 401.

[3] The statute has only a prospective operation. France *v.* State, 57 Ohio St., 1.

[4] A patent issued to Samuel Thompson for a new and useful improvement, being a mode of preparing, mixing, compounding, administering, and using a certain medicine, did not entitle his assignee, not being qualified to practise medicine under the statute, to prescribe it or administer it in the character of a practising physician. Jordan *v.* Overseers of Dayton, 4 Ohio, 295 (1831); cited and approved, McGuire *v.* State, 42 Ohio St., 535 (1885); State *v.* Telephone Co., 39 Ohio St., 311 (1880); Tod *v.* Wick, 39 Ohio St., 382 (1881).

[5] See n. 3, p. 417.

[6] See note 1, p. 416.

[7] Every person must first comply with the provisions of the statute before engaging in the practice of

All persons authorized and entitled prior to July 1st, 1900,

medicine or surgery (sec. 4,403 *c*); sec. 4,403, *g*, makes it a misdemeanor for any person to practise medicine or surgery without having first complied with secs. 4,403, *c*, and 4,403, *d*; compliance with both of these sections is essential. All persons engaging in practice after ninety days after the act (of 1896) took effect must have the necessary certificate. Hale *v.* State, 58 Ohio St., 676.

The right to practise medicine is not a privilege or immunity of a citizen of the United States. France *v.* State, 57 Ohio St., 1, citing Bradwell *v.* State, 16 Wall, 130.

There is nothing unreasonable (1897) in the regulations adopted for the admission to practise, nor in the exemption of physicians residing in other States. France *v.* State, 57 Ohio St., 1.

While a statute should not be so construed as to create a right in one who acts in violation of its provisions, this rule did not apply to deprive of the right to compensation, under Act May 5th, 1868, a practitioner of ten years a part of which was after the passage of the act. The statute was not intended to create a right, but to prohibit the exercise of the right (which before was universal) by unqualified persons. The right remains in all persons except those from whom it is taken away by statute. The manifest purpose cannot be defeated by any general rule of construction. Wert *v.* Clutter, 37 Ohio St., 347.

The repeal of a law forbidding recovery for services by an unlicensed physician does not validate a contract for such services rendered by an unlicensed physician while the law was in force. Nichols *v.* Poulson, 6 Ohio St., 306 (1834).

The civil law drew no barriers around the practice of medicine. The common law favored a similar freedom. It was a right inherent in every man to practise the art of medicine. But it is within the power of the legislature to prescribe qualifications for the practice of medicine. State *v.* Ottman, 4 Ohio N. P., 195 (1897); 6 Ohio Dec., 265.

The right to practise medicine does not emanate from or depend upon citizenship of the United States. The State's power to determine legislatively who shall be allowed to practise medicine cannot be hampered, controlled, or governed by the citizenship of the United States, of the person who endeavors to obtain permission to practise medicine; therefore the statute does not infringe the first sec. of 14th amdt. U. S. Const. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio, Dec., 265, citing Bradwell *v.* State, 16 Wall, 130.

The act (February 27th, 1896) does not impair the obligation of any contract by forbidding a man, not legally qualified under the law, to use a title conferred upon him by a diploma from a medical college issued to him before the passage of the act; it is the law, not a medical college, which confers the right to practise medicine, no matter what may be said in a diploma. State *v.* Morrill, 5 Ohio N. P., 133.

The laws prior to 1896 did provide (secs. 4,403, 6,692) that a person who had studied medicine in a medical college, of a certain character for a certain period, or had practised medicine for a certain period, should be entitled to practise; nevertheless, it was within the police power, for the legislature, for the public welfare, by subsequent act to regulate the practice of medicine. [The opinion implies that this power extended to excluding from practice those who had complied with the previous laws, and had thereby become entitled to practise.] State *v.* Morrell, 7 Ohio Dec., 52; 5 Ohio N. P., 133.

There is an inherent natural right to practise in the absence of any restriction by law. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

A medical college does not by its diploma confer the right to practise medicine. That right comes from the law and is subject to the regulation of the State. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

The manifest object of laws regulating the practice of medicine and surgery is to protect the people from injury from the ignorance of persons who have no adequate education or training, and from the designs of the

to practise under the Act of February 27th, 1896,[1] may engage[2] in such practice and shall be subject to the law regulating the same (see below, "Act of February 27th, 1896").[3]

All other persons[4] shall apply to the State board of medical registration and examination for a certificate[5] and submit to an examination,[6] except that all medical students who were on January 1st, 1900, matriculated in any medical college[7] in the State of Ohio recognized by the State board of medical registration and examination of Ohio, and who shall have graduated subsequent to January 1st, 1900, and who shall file their diplomas for registration prior to July 1st, 1904, shall receive certificates under

evil-minded. Evans *v.* State, 6 Ohio N. P., 129; 9 Ohio Dec., 222.

[1] A legal practitioner on February 27th, 1896, was one who was then engaged in the practice of medicine in accordance with Act May 5th, 1868. State *v.* Ohio State Med. Board, 60 Ohio St., 21.

State *v.* Ohio St. Med. Board, 60 Ohio St., 21, discusses the requirements of a legal practitioner under Act May 5th, 1868.

The statute (February 27th, 1896) is not an *ex post facto* law nor bill of attainder. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

[2] The board of administration of Cincinnati might, in the exercise of the police power, properly require all persons practising medicine or surgery in Cincinnati to register as such (*ob. dic.*). But a regulation which forbids a person authorized under the laws of the State to practise medicine from doing so without the sanction of an officer of the corporation and imposing a penalty therefor, exceeds the power of the municipal corporation and cannot stand. When the general assembly assumes to legislate, and by general law makes provision as to the persons authorized to practise medicine, municipal regulations prescribing a further qualification cannot be upheld unless specific and express power has been conferred on the municipal corporation to impose additional restrictions. State *ex rel.* Baldwin *v.* Prendergast, 8 Ohio C. C., 401.

[3] There is no distinction between the right to establish a practice and the right to enjoy a practice already established. State *v.* Gravett, 65 Ohio St., 289 (*cf. contra* p. 459, n. 2.

[4] A person who was a legal practitioner when the act was passed must furnish the board satisfactory evidence to that effect; all others must undergo examination. Hale *v.* State, 58 Ohio St., 676.

The legislature is the judge of what changes may be required in the regulation of the practice. So long as it provides a constitutional forum to determine questions of the right, and gives those in practice a reasonable time to comply with the new law, it is not an interference with a vested right of the physician. Kowenstrot *v.* State, 4 Ohio N. P., 257; 6 Ohio Dec., 467—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

[5] If defendant is charged with practising without a certificate he cannot show as a defence that he has done everything required by law to procure one, and that the board has refused a certificate for reasons unknown to him; nor can he show as a defence why the board refused him a certificate. It is no defense that the board has erred in the performance of its duty; or that if justice had been done to him he would have received a certificate. Kowenstrot *v.* State, 15 Ohio C. C., 73.

[6] See n. 2, p. 417.

[7] On what is the contract between a medical college and a student, see State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

the provisions of the Act of February 27th, 1896 (see below, "Act of February 27th, 1896").

The applicant shall file with the secretary of the board a written application on a form prescribed by the board, verified by oath, and furnish satisfactory proof that he is more than twenty-one years of age and is of good moral character.[1] In the application, as a condition of admission to the examination, he shall produce either of the following credentials: a diploma from a reputable college granting the degree A.B., B.S., or equivalent degree; a diploma from a normal school, high school, or seminary, legally constituted, issued after four years of study; a teacher's permanent or life certificate; a medical student's certificate, issued upon examination by any State board;[2] a student's certificate of examination for admission to the freshman class of a reputable literary or scientific college; or a certificate of his having passed an examination conducted under the direction of the State board of medical registration and examination by certified examiners, none of whom shall be either directly or indirectly connected with a medical college, said examination to be held simultaneously in Cincinnati, Cleveland, Columbus, and Toledo, and the questions submitted to be uniform at such places, and has either received a diploma from some legally chartered medical institution in the United States in good standing at the time of issuing such diploma, as defined by the board, or a diploma or license approved by the board, which has conferred the full right to practise all branches of medicine or surgery in some foreign country. With the application the applicant shall present his diploma or license as above defined, and accompanying the same shall file his affidavit stating that he is the person named

[1] The Act of May 5th, 1868, was entitled "An act to protect the citizens of Ohio from empiricism and elevate the standing of the medical profession;" held that though the letter of the statute excluded from its operation a person of good moral character by the use of *and* instead of *or*, the court would, considering the purpose of the statute, substitute *or* for *and* so to construe it as excluding from practice persons not possessing both a good moral character and the other qualifications. Wert *v.* Clutter, 37 Ohio St., 347.

A law enjoining reasonable requirements as to learning and character, for the practice of medicine is an exercise of the police power. It may be exercised in barring those who apply and excluding those who have been practising. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio, Dec., 265.

[2] Certificates received on examination entitle the holder to practise for one year; others continue in force indefinitely unless revoked by the board. Hale *v.* State, 58 Ohio St., 676 (1898).

in the diploma or license, and is the lawful possessor of the same, and giving his age, residence, the college or colleges at which he obtained his medical education, the time spent in each college, the time spent in the study of medicine, and such other facts as the board may require; if engaged in the practice of medicine, the applicant shall state the period during which and the places at which he has been engaged in the practice of medicine or surgery.[1] If the board shall find[2] that the applicant has obtained any one of the credentials heretofore defined as a condition of his admission to examination, and shall find his diploma genuine[3] and from a legally chartered medical institution[4] in the United States in good standing,[5] as determined by the board,

[1] One could not enter upon the practice of medicine in 1877 in violation of the terms of a penal statute, and by persisting in such practice for ten years acquire the status of a legal practitioner. State *v.* Ohio State Med. Board, 60 Ohio St., 21 (distinguishing Wert *v.* Clutter, 37 Ohio St., 347).

In Wert *v.* Clutter, 37 Ohio St., 347 (1881) the right to practise under the Act of May 5th, 1868, was considered, and it was determined that the ten years' previous practice entitling a physician to continue practice could embrace time after as well as before the passage of the law, so that after such ten years' practice a physician became entitled to charge for his services without a diploma or a certificate of qualification (two judges dissenting). This decision was criticised and apparently disapproved in State *v.* Ohio State Medical Board, 60 Ohio St., 21.

[2] Evidence of one's qualifications for a certificate is to be presented to the board, not to the jury on the trial of a physician for practising without a certificate, and such evidence is not competent to go to the jury. Kowenstrot *v.* State, 6 Ohio Dec., 467; 4 Ohio N. P. Rep., 257—rev'd for error in admission of other testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

A court cannot compel the performance of an act by the health department which is only to be done on satisfactory evidence, if such evidence was not produced to the department. State *ex rel.* Baldwin *v.* Prendergast, 3 Ohio Dec., 690; 8 Ohio C. C., 401.

[3] There is no provision of law which makes it the duty of the board to determine in advance of an application for a certificate to practise medicine, whether a person holds a diploma from a medical institution of proper standing. It is only when a diploma is presented upon such application that the action of the board can be invoked. State *v.* Coleman, 64 Ohio St., 377.

The diploma and affidavit required of a graduate of a medical college does not necessarily entitle him to a certificate; the board must pass on the genuineness of the diploma and the standing of the college, and still may refuse a certificate, if in its opinion his habits or character render him unfit to practise. Hale *v.* State, 58 Ohio St., 676.

[4] On the power of a college to add a new medical subject to its curriculum without amending its charter, see State *v.* Hygeia Medical College, 60 Ohio St., 122.

[5] Sec. 4,403, *c*, conferring upon the board power to determine whether a diploma is issued by a legally chartered medical school in *good standing*, is not in conflict with sec. 28 of Act 2 of Ohio Const., nor of sec. 10 of Art. 1, U. S. Const., nor of the 14th Amdt., U. S. Const. It is not retroactive, does not impair the obligation of contracts, and does not deny to parties due process of law. State *v.* Coleman, 64 Ohio St., 377.

It is no ground for the issuance of

or shall find the license to be genuine, and such as to confer upon the applicant the full right to practise all branches of medicine or surgery in the foreign country in which he obtained it, and of a standard approved by the board, and shall find the person named in the diploma or license is the person holding and presenting the same,[1] and is of good moral character,[2] the board shall admit such applicant to an examination[3] (Act 1900, April 14th, amending s. 4,403, *c*, Rev. 1897).[4]

EXAMINATIONS shall be conducted under rules formulated by the board, in anatomy, physiology, pathology, chemistry, materia medica, and therapeutics, the principles and practice of medicine, surgery, obstetrics, and such other subjects as the board may require. The applicant shall be examined in the materia medica and therapeutics and the principles and practice of medicine of the school of medicine in which he desires to practise, by the member or members of the board representing such school.[5] If an applicant passes an examination satisfactory to the board and has paid the fee hereinafter provided, it shall issue its certificate, which, when left with the probate judge for record, shall

a writ of mandamus that the action of the board in adjudging an institution not to be in good standing is purely arbitrary and the result of prejudice, because the system taught by it is new and different from that adopted by other medical colleges. State *v.* Coleman, 64 Ohio St., 377.

There is no provision of law authorizing an application to the board by a medical institution to obtain official recognition of its good standing, nor any provision requiring of the board any official action on such application. State *v.* Coleman, 64 Ohio St., 377.

The standing of a medical college is not to be determined alone from the course of study it has prescribed for graduation; the statute imports, at least, that the institution shall be one which has established a favorable reputation among members of the medical profession. The board should not be required to recognize one that from the brief period of its existence, or the novelty of its system of treatment, has not yet acquired such reputation, but might in the judgment of the board be considered as still in an experimental stage. State *v.* Coleman, 64 Ohio St., 377.

By the terms of sec. 4,403, *c*, good standing is to be determined in the first instance by the board and not by a court. State *v.* Hygeia Medical College, 60 Ohio St., 122.

[1] The remedy for the board's refusal belongs to the rejected applicant, not to the college on whose diploma the application was made. State *v.* Coleman, 64 Ohio St., 377.

[2] The statute has left much to the sound discretion of the members of the board, who, it must be assumed, will act as their official position requires, fairly, impartially, and justly to all concerned. State *v.* Coleman, 64 Ohio St., 377.

[3] The legislature might provide that only the learned may pursue a learned profession whose activities so closely affect them (*ob. dic.*). State *v.* Gravett, 65 Ohio St., 289.

[4] A detailed analysis of sec. 4,403, *c*, will be found in State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

[5] See n. 2, p. 417.

be conclusive evidence that its owner is entitled to practise medicine or surgery in the State (*ib.*).

Refusal or Revocation of Certificate.—The board [1] may refuse [2] to grant a certificate [3] to any person guilty of fraud in passing the examination, or guilty at any time [4] of felony or gross immorality, or addicted to the liquor or drug habit to such a degree as to render him unfit to practise medicine or surgery, and may after notice and hearing revoke [5] a certificate [6] for like cause or causes.[7] An appeal may be taken from a refusal or revocation to the governor and attorney general,[8] whose decision shall be

[1] A discretion committed to the health department cannot be interfered with by a court unless abused. State *ex rel.* Baldwin *v.* Prendergast, 8 Ohio C. C., 401; 3 Ohio Dec., 690.

[2] The medical board does not exercise the judicial power which the Constitution reserves to the courts; it is a public agency to insure the effective execution of a law designed for the promotion of the public health and welfare. France *v.* State, 57 Ohio St., 1.

On the remedy against a board by mandamus in case of refusal in bad faith to grant a certificate to one whose qualifications entitle him thereto, see Kowenstrot *v.* State, 4 Ohio N. P., 257; 6 Ohio Dec., 467—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

[3] The writ of mandamus does not issue against an official board, unless the acts whose performance is thus to be compelled are a duty specifically enjoined by law upon the board. State *v.* Coleman, 64 Ohio St., 377.

[4] The law respecting refusal and revocation of certificates is not an *ex post facto* law or bill of attainder. France *v.* State, 57 Ohio St., 1; see Hawker *v.* State, p. 390, note 2.

The statute does not authorize the board to deprive a person who has practised, one who is called by the law "a legal practitioner," of the right to continue it because he committed a felony before the passage of the act. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265 (1897). See Hawker *v.* State, p. 390.

The legislature has as much right to purify the profession of felonious and immoral practitioners as it has to exclude such persons from entering the profession (*ob. dic.*). State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

In Kowenstrot *v.* State, 15 Ohio, C. C., 73, the court refused to consider whether the statute was retroactive and therefore unconstitutional.

[5] The practice of medicine is not a property right nor a vested right, but it is a valuable right, and no one can arbitrarily and without reason be deprived of it. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

[6] The power of revocation applies only to certificates issued by the board (so held in 1897). State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

[7] When a physician accepts a certificate authorized by the act, he takes it subject to the conditions imposed by the act and subject to revocation under the act. France *v.* State, 57 Ohio St., 1, see note 1, p. 532.

[8] The provisions giving to the medical board power to refuse or revoke licenses, and allowing an appeal to the governor and attorney general, do not give to those functionaries power which belongs exclusively to courts. (The court cites numerous analogous instances where boards are clothed with the authority to ascertain facts and apply the law.) France *v.* State, 57 Ohio St., 1.

Judicial power, within the meaning of sec. 1, art. iv. of the State Constitution, means the power to hear and determine rights of property and controversies between parties. It is not this power which is conferred on the governor and attorney

final. An affirmative vote of not less than five members shall be required to authorize the issuance of a certificate (*ib.*).

Fee.—For examination, to be paid in advance to the treasurer of the board, $25, not to be returned in case of failure, but applicant may within a year be examined without additional fee (*ib.*).

By applicant from another State (see Exceptions, below), $50 (*ib.*).

Exceptions.—Nothing in the section shall compel any person holding or obtaining prior to July 1st, 1900, a certificate from the board under the act of February 27th, 1896, entitling to practise medicine or surgery in the State, or any medical student who was matriculated on January 1st, 1900, in any medical college in the State, recognized by the State board of medical registration and examination, and who shall have graduated subsequent to January 1st, 1900, and filed his or her diploma for registration prior to July 1st, 1904, *or* to file an application and submit to the examination herein required. The board may in its discretion dispense with an examination of a physician or surgeon duly authorized to practise medicine or surgery in any other State, Territory, or the District of Columbia, desiring to change his residence to Ohio, and making application on a form to be prescribed by the board, with a fee of $50 and a certificate or license issued after an examination by the medical board of such State, Territory, or District, whose laws demand qualifications of equal grade with those of Ohio; but such examination shall not be dispensed with unless, under the law and regulations of the State, Territory, or District, equal rights and privileges are accorded to physicians and surgeons of Ohio, holding the certificate of the board, desiring to remove to and practise in such State, Territory, or District (*ib.*).

Recording Certificate and Changes of Residence.—The certificate under section 4,403, *c*, must be recorded,[1] before

general. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

[1] Every person must file his certificate with the probate judge; there is no exception in favor of graduates or former legal practitioners, nor any distinction on account of the method of obtaining the certificate or otherwise. Hale *v.* State, 58 Ohio St., 676.

The statute respecting filing with the probate judge was designed to operate uniformly upon all members of the medical profession; its purpose was to provide a public record, open at all times to public inspection, containing a complete list of all authorized resident practitioners in the county from which it can be readily ascertained who are legally authorized

the holder enters on practice, with the probate judge of the county of his residence.[1] The judge shall record it and indorse on the margin of the record and on the certificate the time of its receipt for record and make a proper index of all certificates (*ib.*, s. 4,403, *d*).[2] He shall also note in the margin of the record the revocation of a certificate or any change in the location or death of the owner. He shall make out a certified copy of certificate and indorsements, on application, which shall be *prima facie* evidence of all matters and facts therein contained. He is required to furnish to the secretary of the State board in December of each year a list of all certificates recorded and in force, a list of revocations, removals, and deaths during the year. In case of change of residence, the owner must have his certificate recorded anew by the probate judge of the county into which he removes.

FEES.—To probate judge, for recording and indexing each certificate, 50 cents.

For certified copies, same fees as allowed by law for copies and certificates of records of probate judge (*ib.*, s. 4,403, *d*). [See below, titles MIDWIFERY, FEE; OSTEOPATHY, FEES.]

MIDWIFERY—FORMER PRACTITIONERS.—The Act of 1892

to practise the profession. Hale *v.* State, 58 Ohio St., 676.

An indictment charging a person with not filing his certificate for record, which does not show that he belongs to class (3) in note 3, p. 435, charges no offence. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

[1] The court declined to consider whether by discriminating against non-residents (in the provisions of sec. 4,403, *d*, requiring the certificate to be filed in the county of residence, and in forbidding non-residents to open an office in the State or appointing a place in the State to meet patients) the act discriminates against citizens of other States (U. S. Const., Art. iv., s. 2), or abridges privileges and immunities of citizens of the United States, because the accused was not a non-resident, and could not avail himself of the rights of non-residents if any, to prevent the law from operating upon him. France *v.* State, 57 Ohio St., 1.

It is intimated in France *v.* State, 57 Ohio St., 1, that when a non-resident opens an office in the State, or appoints a place within the State to meet patients, he becomes a resident within the act.

This means that the certificate must be recorded in the county where the doctor abides or dwells for some continuance of time for business purposes, and places the non-resident upon an equality with the resident doctor. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

If a non-resident, residing on the borders of a neighboring State, opens an office or appoints a place to meet patients or receive calls [within the State?], he must have the certificate. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

A citizen of Ohio cannot successfully object to a law because it denies equal privileges and immunities to citizens of other States (art. iv., s. 2, U. S. Const.). State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

[2] See n. 7, p. 418.

permitted persons then practising midwifery in the State, to file within thirty days thereafter with the probate judge of the county in which *she* resided, an affidavit setting forth that and other facts, on which she received from him a certificate entitling the applicant and holder to practise midwifery. Such certificates were to be recorded by the probate judge, and, in case of transfer of residence, again recorded in the new county, as provided by section 4,403, *d*, regulating the record of physician's certificates (*ib.*, s. 4,403, *e*).

MIDWIFERY—LISTS OF CERTIFICATES.—The probate judge is required to furnish to the Secretary of State annually in December a list of all certificates in force or revoked during the year, or the owners of which have removed or died during the year (*ib.*).

MIDWIFERY.—EXAMINATIONS.—Applicants desiring to enter on practice of midwifery must appear before the State board and submit to such examination therein as the board shall require (*ib.*).

MIDWIFERY—CERTIFICATE AND FEE.—If the applicant passes a satisfactory examination, the board on payment of fee of $10 issues its certificate to that effect, which when filed with the probate judge for record shall entitle the owner and holder to practise midwifery (*ib.*).

The certificate may be refused or revoked for the same causes in the same manner as provided in section 4,403, *c* (above).

MIDWIFERY — ABNORMAL CONDITIONS. — The certificate granted to practise midwifery shall not give the holder the right to perform version, or treat breech or face presentation, or do any obstetric operation requiring instruments, or to treat any other abnormal condition except in emergencies (*ib.*).

DEFINITION.[1]—Any person shall be regarded as practising medicine or surgery or midwifery who shall use the words or letters "Dr.," "Doctor," "Professor," "M.D.,"[2] "M.B.," or any

[1] The term *empiric*, as used in the title of the act of May 5th, 1868, was defined to mean "a medical practitioner who has not graduated in a medical college, or" [who?] "has" [not?] "a certificate of qualification from a medical college, or has not been engaged in the continuous practice for the period prescribed in the statute." Wert *v.* Clutter, 37 Ohio St., 347.

A *steam doctor* was within the purview of Act of February 26th, 1824, prohibiting persons without license from practising physic. Nichols *v.* Poulson, 6 Ohio, 306 (1834). See note 1, p. 416.

[2] The offence under sec. 4,403, *f* (as)

other title, in connection with his name,[1] which in any way represents him as engaged in the practice of medicine or surgery or midwifery in any of its branches,[2] or[3] who shall prescribe[4] or recommend for a fee for like use any drug or medicine,[5] appliance,

it stood in 1898), may be committed by prescribing a medicine or remedial agency for a fee, *or* by appending to one's name the letters M.D.; but the offender may offend against both provisions at once, and both may be charged in a single count; and there may be conviction on proof of either. The several offences may be alleged in the indictment conjunctively. Hale *v.* State, 58 Ohio St., 676, see n. 7, p. 418; n. 1, p. 304.

By sec. 4,403, *f* (Act 1896), the legislature intended that the appending of the initials M.D. by any person who has not complied with such requirements of the act as affect him, are prohibited to him. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

[1] For a criticism of making the appending of letters to one's name, the practice of medicine and surgery, instead of merely evidence of the practice, see State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

[2] Where the allegation in a complaint or petition for malpractice is that defendant was employed as a physician, the gravamen of the allegation is that he was employed as one professing to have skill and experience in the treatment and cure of the malady with which the plaintiff was supposed to be afflicted. Musser's Exr. *v.* Chase, 29 Ohio St., 577.

[3] See n. 2, p. 427.

[4] Administering medicine may be the office of a nurse; but prescribing medicine to the sick implies the exercise of skill in the discrimination of diseases, and the selection of fit remedies; to acquire which skill is the object of medical education, and to exercise which, for fees, is but another name for the practice of medicine. Jordan *v.* Overseers of Dayton, 4 Ohio, 295.

[5] In State *v.* Gravett, 65 Ohio St., 289, the court distinguished the construction of sec. 4,403, *f*, as amended by Act April 14th, 1900, from that section as it existed prior to the amendment, and as interpreted in State *v.* Leffring, 61 Ohio St., 39. In the earlier case the unamended section had been construed by the application of the maxim *noscitur a sociis*, and "*other agency*" had there been limited to the same category as "*drug*" and "*medicine*," in conjunction with which it was used; in State *v.* Gravett the court held that the amended statute, by using the words "drug or medicine, appliance, application, operation, or treatment of whatever nature," afforded no proper occasion for the application of the maxim; and in the amendment the legislature attempted comprehensive regulation of the practice of the healing art, so as to require the preparatory education of those who for compensation practise it according to any of its theories; and that OSTEOPATHY was included within the practice regulated by the law after the said amendment of sec. 4,403, *f*.

Under sec. 4,403, *f*, as it stood in 1899, the word "other agency" was construed by the maxim *noscitur a sociis*, and its associated words being drug and medicine, "other agency" did not include *osteopathy*, of which the court from its general knowledge finds that its adherents wholly reject drugs and medicine. State *v.* Leffring, 61 Ohio St., 39; 46 L. R. A., 334.

The obvious purpose of the act, s. 4,403, *f* (as it stood in 1899), was to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition, and to protect society from the evils which result from the administration of patent drugs by the ignorant and unskilful. State *v.* Leffring, 61 Ohio St., 39.

Osteopathy is not an *other agency* within the meaning of the Act of 1896, sec. 4,403, *f*. Eastman *v.* State, 4 Ohio N. P., 163 (1897); 6 Ohio Dec., 296.

If it was the intention of the act

application, operation, or treatment [1] of whatever nature,[2] for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease.

The use of any of said words, letters, or titles in such connection and under such circumstances as to induce the belief that the person who uses them is engaged in the practice of medicine

to prohibit the practice of osteopathy, clairvoyance, mind healing, faith cure, hypnotism, massage, and Christian Science it should have been specifically mentioned and not left to mere inference from the general words "other agency" (so held, prior to the amendments of 1900 and 1902). Eastman *v.* State, 4 Ohio N. P., 163 (1897); 6 Ohio Dec., 296, see note 3, p. 379.

If "other agency" is to be limited to agencies in the same category as drugs and medicines, it would not embrace those who use the knife and saw on the living human body; and rules of construction do not exclude the application of common sense to avoid an absurdity which the legislature ought not to be presumed to have intended. *Other agency*, therefore, is not limited to agencies in the same or a similar category to drugs and medicines, prescribed, directed, or recommended (for the surgeon does not usually prescribe, direct, or recommend his agencies, he wields them), but extends to agencies effective in surgical cases, fractures, wounds, etc. Nevertheless there is nothing in an information charging the use of "the system known as Christian Science," indicating that it is a drug, medicine, or *other agency* of the kind implied in the law; and such an information charges no offence. It should be overruled on demurrer, or by motion to quash. Evans *v.* State, 6 Ohio N. P., 129 (1898); 9 Ohio Dec., 222.

Drugs, medicines, or other agency meant an agency having physical attributes, not an agency in which the application of the remedy does not partake of physical attributes but which [*e.g.*, Christian Science as the evidence showed it in this case] is the operation of some subtle influence flowing from the mind of one to another, or growing out of a *contract* [contact?] of the spiritual nature with the great source from which it came. Evans *v.* State, 6 Ohio N. P. 129; 9 Ohio Dec., 222 (1898) [Hamilton Co. Common Pleas].

The legislature did not intend by these statutes to include Christian Science, as the evidence shows it to have been utilized in this case. Evans *v.* State, 6 Ohio N. P., 129 (1898) [Hamilton Co. C. P.], *cf.* p. 699.

[1] The court does not take judicial notice of what "the system known as *Christian Science*" is. Evans *v.* State, 6 Ohio N. P., 129; 9 Ohio Dec., 222.

The evidence shows that Christian Science is a kind of religious belief. Whatever may be the power of the legislature where the practices under a religious belief are against good morals or menace the public health, it is evident that the legislature did not intend to include Christian Science; if the legislature intended to interfere in matters of religious belief it would have plainly said so and not left it to inference. Evans *v.* State, 6 Ohio N. P., 129 (1898).

[2] In a decision reported in the daily papers, March 2d, 1905, and not officially reported as this goes to press, it is said to have been determined by the Supreme Court of Ohio that the giving of *Christian Science* treatment for a fee for the cure of disease is practising medicine within the meaning of the statute; and the law is not interference with the rights of conscience and of worship, conserved by sec. 7 of the Bill of Rights; and legislation prohibiting any one from treating a disease for a fee, except such as have the prescribed qualifications, is a valid exercise of the police power of the State and is constitutional. *Cf.* State *v.* Biggs (N. C.), p. 405, n. 2. See Appendix, p. 699.

or surgery or midwifery in any of its branches, shall be *prima facie* proof of an intent to represent himself as engaged in the practice of medicine or surgery or midwifery (Rev. 1897, s. 4,403, *f*, as amended by Act April 14th, 1900, and April 21st, 1902).

Exceptions.—Nothing in the act prohibits service in case of emergency[1] or the domestic administration of family remedies. Nor does it apply to any commissioned medical officer of the United States army, navy, or marine hospital service in the discharge of his professional duties, nor to any legally qualified dentist when engaged exclusively in the practice of dentistry, nor to any physician or surgeon from another State or Territory[2] who is a legal practitioner of medicine or surgery in the State or Territory in which he resides, when in actual consultation with a legal practitioner of this State, nor to any physician or surgeon residing on the border of a neighboring State[3] and duly authorized under the laws thereof to practise medicine or surgery therein, whose practice extends into the limits of this State, but such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of this State[3] (*ib.*).

Osteopathy.[4]—Nor does the law apply to any osteopath who

[1] A stipendiary service forbids the belief that it was an act of neighborly kindness or the execution of a moral duty. Jordan *v.* Overseers of Dayton, 4 Ohio, 295 (1831).

The administering of medicine in a case of emergency or an administering of family remedies is not a part of the description of the offence, but in the nature of a personal privilege, granted under particular circumstances. Kowenstrot *v.* State, 6 Ohio Dec., 467; 4 Ohio N. P. Rep., 257—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

The fact that the case in which defendant prescribed was an emergency is no defence to a prosecution for practising without certificate. Plaut *v.* State, 10 Ohio C. C., 821 (1899) (Hamilton Circuit). [This seems difficult to reconcile with the express provision of the act.]

[2] The exception of non-resident physicians does not make the act unconstitutional. France *v.* State, 57 Ohio St., 1, citing Dent *v.* W. Va., 129 U. S., 124. See n. 7, p. 418.

The legislature has the power to require of non-resident practitioners the same qualifications as are exacted of residents. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265.

The statute does not prohibit non-resident practitioners from practising in the State; at least, not directly. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265. See n. 1, p. 426.

[3] The two kinds of physicians, residents and those residing on the borders of a neighboring State, are not environed by the same circumstances and conditions; and the discrimination, though it favors non-residents, is not arbitrary. State *v.* Ottman, 4 Ohio N. P., 195; 6 Ohio Dec., 265, citing Dent *v.* W. Va., 9 Supr. Ct. Rep., 231. See n. 1, p. 426.

[4] A scientific conclusion adverse to the efficacy of osteopathy cannot be

shall pass examination in anatomy, physiology, obstetrics and physical diagnosis, in the same manner as is required of other applicants before the State board of medical registration and examination, and who has thereupon received a certificate from the board, which when filed with the probate judge, as is required in the case of other certificates from the board, shall authorize the holder thereof to practise osteopathy in the State of Ohio, but shall not permit him to administer drugs nor to perform major surgery, provided that all applicants to practise osteopathy shall before being admitted to examination file with the board, accompanied with the fee of $25, evidence of preliminary education as required by sec. 4,403, *c*, and a certificate from the osteopathic examining committee as hereinafter provided, showing first, that he holds a diploma or a physician's osteopathic certificate from a reputable college of osteopathy, as determined by this committee; second, that he has passed examination in a manner satisfactory to the committee on the subjects of pathology, physiological chemistry, gynecology, minor surgery, osteopathic diagnosis, principles and practice of osteopathy.

Osteopathic Examining Committee.—The law of 1902 (Act, April 21st, 1902, amdg. Rev. St., s. 4,403, *f*) provided that within thirty days after its passage, the State board of medical registration and examination should appoint upon recommendation of the Ohio Osteopathic Society, three persons (and thereafter their successors) who shall constitute the osteopathic examining committee.

Each person so appointed must file with the State board of medical registration and examination a certificate of the Ohio Osteopathic Society, setting forth that the person named is a graduate of a reputable college of osteopathy, that he has been engaged in the practice of osteopathy in the State of Ohio for at least one year, that he is of good moral character and in good standing in his profession (*ib.*).

Former Practitioners of Osteopathy.—The Act of

drawn by a body to which legislative power alone is given, and for whose members there is no prescribed qualification of education, knowledge, or intelligence. State *v.* Gravett, 65 Ohio St., 289.

In State *v.* Gravett the court declined to state whether it would take judicial notice that no college of osteopathy exists which meets the statutory requirements of the law which it pronounced invalid, see n. 1, p. 416; n. 5, p. 428.

1902 (Act April 21st, 1902, amdg. Rev. St., 4,403, *f*) provided that any person engaged in the practice of osteopathy in Ohio at the time of its passage, who then held a diploma from a regular college of osteopathy as determined by the committee and who made application to the State board of medical registration and examination within thirty days after the passage of the act, upon the payment of $5, should receive a certificate from the board without examination, which when filed with the probate judge, as was required in the case of other certificates from the board, should authorize the holder to practise osteopathy in the State, but should not permit him to administer drugs nor to perform major surgery (*ib.*).

Osteopathy—Practice without Examination. — The board may in its discretion upon recommendation of the osteopathic committee and the payment by the applicant of a fee of $50 issue certificates without examination to graduates of reputable schools of osteopathy, who are of good moral character and who for five years or more have been engaged in the practice of osteopathy in any other State (*ib.*) [see below, Meetings of the Osteopathic Examining Committee].

Osteopathy—Penalty.—Any person announcing or advertising himself as an osteopath who has not complied with the provisions of this act shall be subject to the penalties provided in sec. 4,403, *g* (*ib.*).

Meetings of the Osteopathic Examining Committee.—This committee shall meet at the office of the board at such time as the board may direct, whenever there are applications for osteopathic certificates to be acted upon, but shall take no part in the deliberations of the board (*ib.*).

Osteopathy, Fees.—To the board from applicants for osteopathic examination, before examination, $25 (*ib.*). From former practitioners of osteopathy, within thirty days after the passage of Act of 1902, $5 (*ib.*). From applicant to practise osteopathy without examination after graduation and five years' practice in another State, $50 (*ib.*).

Offence, Penalty.—Practising medicine or surgery[1] in

[1] If the period of ten years after the passage of the act had been spent outside the State, such practitioner would not be amenable to the provisions of the statute (so held of Act May 5th, 1868). Wert *v.* Clutter, 37 Ohio St., 347 (*cf.* contrary conclusion in Kansas, n. 6, p. 270.

violation[1] of the law[2] is a misdemeanor,[3] punishable with fine of

[1] Where the penal section of the act merely imposes the penalty for *violating* the act, it does not extend the inhibitions of the previous section describing what shall be unlawful. Wert *v.* Cintter, 37 Ohio St., 347. See n. 1., p. 430.

In a prosecution under sec. 4,403, *f* (Act 1896, February 27th), it is not necessary in the information to negative the provisions and exceptions. Kowenstrot *v.* State, 15 Ohio C. C., 73 (1897).

[2] On sufficiency of indictment see Hale *v.* State, 58 Ohio St., 676. It is not necessary to aver that the accused was not a legal practitioner when the statute was passed or not a graduate of a medical college (*ib.*); nor is it necessary to aver that the accused was not among the exceptions introduced by provisos in sec. 4,403, *f*. These are matters of defence (*ib.*).

An indictment must state the manner in which the law has been violated. It is not enough to charge that it has been violated. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

On remedy for defective indictment under this law—Motion to quash sustained, though a demurrer might also be—see State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

The mere practice without having first obtained a certificate is not punishable (for the reason that as to two classes of practitioners the certificate is merely evidence of the right, and only as to a third class is it the foundation of the right). State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

It is not a sufficiently certain allegation of an offence to say that the accused for a fee prescribed, directed, and recommended to A a certain agency, to wit, "a system known as Christian Science." The facts should be so stated that the nature of the offence charged may be easily understood by the jury; and as "a system known as Christian Science" is probably almost wholly unknown to the average juror, such an information is faulty as a violation of this rule. Evans *v.* State, 6 Ohio N. P., 129 (1898); 9 Ohio Dec., 222.

The State is confined to proof of the agency described in the information and cannot prove the use of another agency. Kowenstrot *v.* State, 15 Ohio C. C., 73.

[3] A right of action for malpractice arises against a practitioner who is practising in violation of the act (May 5th, 1868). The object of the statute was not to make the practice of medicine unlawful, but to protect the community from the evils of empiricism. The court declines to consider whether the action would lie if the patient knew that the physician was practising in violation of law, there being nothing before it to show such knowledge. Musser's Exr. *v.* Chase, 29 Ohio St., 577 (1876). See note 1, p. 422, and n. 7, p. 418.

The duty and risk of ascertaining the qualifications of the physician was not devolved by Act May 5th, 1868, on the patient, and the patient is not *particeps criminis*. Musser's Exr. *v.* Chase, 29 Ohio St., 577.

Whether a proviso must be negatived by the prosecution in order to convict depends on whether such proviso is a necessary part of the definition or description of the offence charged; if the offence charged would not be complete without an averment of the negative the charge must be negatived by the prosecution, but if the description or definition of the offence is otherwise complete, and the proviso only limits its application or operation either as to time, place, or person, the limitation is matter of defence only, and it is for the defendant to show that he is by reason of some of these provisos not chargeable with the offence. Kowenstrot *v.* State, 4 Ohio N. P. Rep., 257; 6 Ohio Dec., 467 (Lucas Co. C. P., 1897)—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119. See n. 2, p. 422.

Criticism of the board in refusing a certificate is not competent in a trial before a jury for practising without a certificate. Kowenstrot *v.* State, 6 Ohio Dec., 467; 4 Ohio N. P. Rep., 257—rev'd for error in admission of testimony, 15 Ohio C. C., 73; 8 Ohio Dec., 119.

$20 to $500, or imprisonment in county jail thirty days to one year, or both.[1] Practising midwifery in violation of the law is a misdemeanor, punishable with fine of $25 to $100 (Rev. 1897, s. 4,403, *g*).

Filing or attempting to file as one's own the diploma or certificate of another, or a false or forged affidavit of identity, or wilful false swearing to any question propounded on a medical examination, or to an affidavit made or filed with the State board, is a felony, punishable with imprisonment in the penitentiary one to five years (*ib.*).

FINES are paid one-third to the person, corporation, or medical society making the complaint or furnishing the information, one-third to the poor fund of the county, one-third to the State board (*ib.*).

ENFORCEMENT.—The secretary of the State board is charged with the duty of enforcing the act, and the prosecuting attorney on his request takes charge and conducts such prosecutions (*ib.*).

ACT OF FEBRUARY 27TH, 1896.[2]—This act still applies to the persons enumerated in title "QUALIFICATION," above, as coming under its terms.

By that act graduates in medicine or surgery were required, personally or by letter or proxy, to present their diplomas to the State board for verification, with the applicant's affidavit that he is the person named in the diploma, is the lawful possessor of the same, and giving his age and the time spent in the study of medicine.[3] If the board shall find the diploma to be genuine and from a legally chartered medical institution in good standing, as determined by the board, and the person named therein be the

[1] The only penalty prescribed by sec. 4,403 (in the law as it was in 1894) is the deprivation of right to compensation; the penalty of fine and imprisonment is imposed by sec. 6,992 (since repealed). State *ex rel.* Baldwin *v.* Prendergast, 8 Ohio C. C., 401; 3 Ohio Dec., 690. See for the interpretation of sec. 4,403 as it was in 1894 in conjunction with sec. 6,992 imposing a penalty (since repealed), State *ex rel.* Baldwin *v.* Prendergast, 8 Ohio C. C., 401; 3 Ohio Dec., 690.

[2] The act (February 27th, 1896) does not violate art. 2, s. 16 of the State Constitution forbidding a bill to contain more than one subject. State *v.* Ottman, 4 Ohio N. P., 195. See n. 1, p. 420.

The act (February 27th, 1896) is not *ex post facto;* it looks to the future. State *v.* Morrill, 5 Ohio N. P., 133 (Huron Co. C. P., 1897).

In the report of Eastman *v.* State in 6 Ohio Dec., 296, the act of February 27th, 1896, is in the headnotes styled the "Mosgrove law." So also in the report of State *v.* Ottman in 6 Ohio Dec., 265.

[3] Nowhere outside of sec. 4,403, *c* (in 1896), is there any other express requirement as to graduates. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52 (1897).

person holding and presenting the same, the board shall issue its certificate [1] to that effect, which when left with the probate judge for record [2] shall be conclusive evidence [3] that its owner is entitled to practise medicine or surgery.

ASTROLOGER, ETC.—Whoever shall represent himself to be an astrologer, a fortune-teller, a clairvoyant, or a palmister, is guilty of a misdemeanor punishable with a fine of $25 to $100, or imprisonment in the county jail from thirty days to three months or both fine and imprisonment; but this act does not apply to any astrologer, fortune-teller, clairvoyant, or palmister to whom a license to practise has been legally granted (Act April 16th, 1900, page 363).

OKLAHOMA.[4]

TERRITORIAL BOARD OF HEALTH.—This board consists of three residents of the Territory, regularly practising and legally qualified physicians in good standing, appointed by the governor and approved by the council (Act 1903, c. 5, s. 1).

The board is required to hold meetings every three months, due notice of the time and place to be given by the secretary (*ib.*, s. 2).

LICENSES.—The Board of Health is required to examine applicants and grant licenses to those found to be qualified [5] and entitled to the same (*ib.*, s. 3).

[1] Where a person is entitled to practise, as one already engaged in practice, and he seeks to comply with the law by obtaining a certificate, and the board arbitrarily refuses a certificate, the practitioner is not guilty of any offence in continuing to practise (*ob. dic.*). State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

[2] The legislature has prescribed the effect to be given to filing as evidence, but does not make filing mandatory in the case of graduates, or persons who not being graduates were still (in 1896) under the laws previously in force entitled to practise. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec. 52 (1897). See n. 1, p. 425.

[3] If not (1) a legal practitioner at the time the act (1896) went into effect, nor (2) a graduate in medicine or surgery, as defined, the applicant (3) must personally appear and submit to examination; and a certificate issued to this class of persons, when left for record, shall entitle the owner to practise. The certificates of the first two classes do not entitle to practise. They show a right, already existing; the other certificates admit to practise. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

As to the first two classes [(1) and (2)] the statute does not say the record shall be the only evidence. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52.

The only persons required to file their certificates as a mandatory matter are those in class (3); to classes (1) and (2) the filing is permissive. State *v.* Morrill, 5 Ohio N. P., 133; 7 Ohio Dec., 52. See n. 2, p. 433.

[4] In Weedon *v.* Arnold, 5 Okl., 578, 49 Pac. R., 905, will be found a discussion of the requirements of law of 1893. This law was repealed in 1903.

[5] Where a person is entitled to a

QUALIFICATION.—No person hereafter (March 12th, 1903) shall practise medicine or surgery without first obtaining a license from the Territorial board of health.

Application for license must be made in writing with a fee of $5, accompanied by proof of good moral character, and proof of ten years' continuous practice,[1] or proof of graduation from a reputable medical college.[1] When the application has been inspected by the board and found to comply with the foregoing provisions, the board shall notify the applicant to appear for examination at a time and place designated in such notice (*ib.*, s. 5).

EXAMINATIONS shall be in whole or in part in writing and be sufficiently strict to test applicant's qualifications to practise medicine. All members of the board shall be present and participate in such examination (*ib.*, s. 5).

REGISTRATION.—The holder of a license must register it in a book in the office of the register of deeds in the county in which he resides or intends to practise, provided that an osteopath shall not be required to pass an examination in materia medica or therapeutics (*ib.*, s. 5).

OFFENCE.—To practise or to offer to practise medicine or surgery in any of their branches, without first having obtained a license from this board, is a misdemeanor, punishable by a fine of from $50 to $100 or imprisonment in the county jail from thirty days to six months, or both fine and imprisonment in the discretion of the court, and all costs incurred (*ib.*, s. 6).

EXEMPTIONS—OSTEOPATHS.—This act does not affect the right of those legally practising medicine, osteopathy, or surgery in the Territory at the time of its passage; nor does it prohibit the application of domestic remedies by one member of a family to another member thereof, nor the administering of remedies by another in case of emergency without compensation, nor to any commissioned medical officer of the United States army, navy, or marine hospital service in the discharge of his official duties, nor to any legally qualified dentist, when engaged exclusively in the practice of dentistry, nor to any physician or surgeon from an-

license to practise medicine upon either of two grounds, and he receives a license upon one of the grounds, a court will not by mandamus order the issuance of a license upon the other of the two grounds. Weedon *v.* Arnold, 5 Okl., 578; 49 Pac. R., 915.

[1] See n. 5, p. 435.

other State or Territory who is a legal practitioner of medicine or surgery in the State or Territory in which he resides, when in actual consultation with a legal practitioner of this Territory, nor to any physician or surgeon residing on the border of a neighboring State or Territory and duly authorized under the laws thereof to practise medicine or surgery therein, whose practice extends into the limits of this Territory, provided that such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of this Territory [nor to any osteopath who shall pass examination in the subjects of anatomy, physiology, obstetrics, and physical diagnosis in the same manner as required of other *applicant* [*sic!*], before the territorial board of health, and who has thereupon received a certificate from the board which when filed with the register of deeds as is required in the case of other certificates from the board shall authorize the holder thereof to practise osteopathy in the Territory, but shall not permit him to administer drugs or to perform major surgery][1] (*ib.*, s. 7).

Fee.—With application for license, $5 (*ib.*, s. 5).

Duel.—Every person who is present at the time when any duel is fought, as surgeon is punishable by imprisonment in the Territorial prison not exceeding seven years (Wilson, s. 2,223).[2]

Itinerant Vender.—Any itinerant vender of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of diseases or injury, who shall by writing, or printing, or any other method publicly profess to cure or treat any disease, or injury, or deformity, by any drug, nostrum, or manipulation, or other expedient, shall pay a license of $100 for the term of one year or less, to the treasurer of the board of pharmacy (Act March 12th, 1897, Wilson, s. 2,903).[2] Violating this section is a misdemeanor punishable with a fine of $100 to $200 (*ib.*).

Medicine Men.—It is unlawful for so-called Indian medicine men to practise among the allotted Indians of the Territory, who *is* not legally authorized under existing statutes to do so, or to hold incantations over the sick, or to maltreat or abuse the

[1] The provision in brackets seems to be superseded by the provisions of the osteopathic law following, which was approved March 17th, 1903.

[2] Wilson's Revised and Annotated Statutes of 1903 were made *presumptive evidence* of all the laws of Oklahoma in force prior to the acts of the 7th legislative assembly (1903), by Act March 16th, 1903.

sick, or to commit immoral practices upon sick persons, or to demand payment for such services (Act 1899, c. 12, Art. 2, s. 1. Wilson's Rev. and Ann. Stats., 1903, s. 2,651).[1]

MESCAL BEAN.—It is unlawful to introduce this or its product on any Indian reservation or allotment or to any allotted Indian, but its use is not prevented by any physician authorized under existing laws to practise his profession in the Territory (*ib.*, s. 2; Wilson, s. 2,652).[1]

OFFENCE.—Violation of this act (1899) is a misdemeanor, punishable with fine of $25 to $200, or confinement in county jail not more than six months, or both, in the discretion of the court (*ib.*, s. 3; Wilson, s. 2,653).[1]

BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION.—This board consists of three persons appointed by the governor, certified by the Oklahoma Osteopathic Association to be graduates of a reputable school of osteopathy and to have been engaged in the practice of osteopathy in Oklahoma for one year or more, and to be of good moral character, and in good standing in *his* profession. The board may formulate rules to govern its action; its president and secretary may administer oaths. The board meets at Guthrie on the first Tuesday of January and July of each year, and at such other times as a majority of the board may appoint.

The board is required to keep a record of its proceedings and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor or diplomate in osteopathy, the date of his diploma, and also whether the applicant was rejected or a certificate granted. The books and register of the board are *prima facie* evidence of all matters recorded therein (Act 1903, c. 22, s. 1).

OSTEOPATHY—QUALIFICATION.—Any person before engaging in the practice of osteopathy shall on payment of a fee of $10 make application for a certificate to practise osteopathy to the territorial board of osteopathic registration [*and*] examination, on a form prescribed by the board, giving (1) his name, age (not less than twenty-one years), and residence; (2) evidence of a preliminary education equal to a high-school diploma or a teacher's certificate; (3) the name of the school or college of osteopathy from which he was graduated and which shall have

[1] See n. 2, p. 437.

been in good repute as such at the time of the issuing of his diploma, as determined by the board; (4) the date of his diploma and evidence that it was granted on personal attendance and completion of a course of study of not less than four terms of five months each and such other information as the board may require. The board may in its discretion accept as the equivalent of any part *of* (*sic!*) all of requirements (2), (3), and (4), evidence of five or more years' reputable practice of osteopathy by an osteopathic physician located in the Territory at the time of the passage of this act (March 17th, 1903), provided such substitution be specified in the certificate. If the facts thus set forth and to which the applicant shall be required to make affidavit, shall meet the requirements of the board as laid down in its rules, the board shall require the applicant to submit to an examination as to his qualifications for the practice of osteopathy, which shall include anatomy, physiology, physiological chemistry, and toxicology, osteopathic diagnosis, hygiene, osteopathic obstetrics and gynæcology, minor surgery, principles and practice of osteopathy, and such other subjects as the board may require.

If such examination be passed in a manner satisfactory to the board, the board shall issue to him a certificate granting him the right to practise osteopathy in Oklahoma. Any person failing to pass such examination may be reëxamined at any regular meeting of the board within a year from the time of such failure without additional fee; provided that any person having a diploma from a legally chartered school or college of osteopathy in good standing as such at the time of issuing such diploma, as defined by the board, and who shall meet the requirements of the board in other respects, who is in active practice in Oklahoma at the time of the passage of this act (March 17th, 1903) may be granted a certificate by the board to practise osteopathy in the Territory, without examination if application for such certificate is filed with the board before January 1st, 1904; provided, further, that a physician's certificate issued by a reputable school of osteopathy after an attendance of not less than two terms of five months each may be accepted by the board on the same terms as a diploma, and the holder thereof be subject to the same other regulations in all other respects as other applicants before the board; provided, further, that the board may in

its discretion dispense with an examination in the case (1) of an osteopathic physician duly authorized to practise osteopathy in any other State or Territory or the District of Columbia, who presents a certificate or license, issued after an examination by the legally constituted board of such State, Territory, or district, accorded only to applicants of equal grade with *those* required in Oklahoma; (2) an osteopathic physician who has been in the actual practice of osteopathy for five years, who is a graduate of a reputable school of osteopathy, who may desire to change his residence to Oklahoma, and who makes application on a form to be prescribed by the board accompanied by a fee of $10 (*ib.*, s. 2).

Osteopathy — Refusal — Revocation. — The board may refuse to grant a certificate to any person guilty of a felony, or addicted to any vice to such degree as to render him unfit to practise osteopathy; and may, after notice and hearing, revoke such certificate for like cause. An appeal may be taken from the action of said board refusing to grant or revoking a certificate for such cause, to the governor and attorney-general; and the decision of such officers shall be final (*ib.*, s. 2).

Osteopathy—Effect of Certificate.—The certificate provided in section 2 shall entitle the holder to practise osteopathy in Oklahoma, but it shall not authorize him to administer drugs nor to perform major or operative surgery (*ib.*, s. 4).

Osteopathic physicians shall observe and be subject to the Territorial and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and other matters pertaining to public health (*ib.*, s. 4).

Osteopathy—Recording.—Every person holding a certificate from the Territorial board of osteopathic registration and examination shall have it recorded in the office of the register of deeds in the county in which he expects to practise, and the date of recording shall be indicated thereon. Until such certificate shall be *field* (*sic!*) for record, the holder shall exercise none of the rights or privileges conferred therein. The register of deeds shall keep in a book a complete list of all the certificates recorded by him, with the date of recording each certificate (*ib.*, s. 5).

Osteopathy — Offence — Penalty. — Practising or attempting to practise or use the science or system of osteopathy

in treating diseases of the human body, or buying, selling, or fraudulently obtaining any diploma, license, record, or registration to practise osteopathy, or aiding or abetting in such selling or fraudulently obtaining or practising osteopathy under cover of any diploma, license, record or registration to practise osteopathy, illegally obtained or signed or issued unlawfully, or under fraudulent representations, or, after conviction of felony, practising osteopathy, or using any of the forms or letters "osteopath," "osteopathist," "osteopathy," "osteopathic physician," "doctor of osteopathy," "diplomate in osteopathy," "D.O.," or any other letter or letters, either alone or with qualifying words or phrases, under such circumstances, to induce the belief that the person who uses such terms is engaged in the practice of osteopathy, without having complied with the provisions of this act, is a misdemeanor, punishable by a fine from $25 to $100, or imprisonment in the county jail from thirty days to one year, or both such fine and imprisonment; provided that nothing in this act shall be considered as prohibiting any lawfully qualified osteopathic physician in any other State or *county* [*sic!*] meeting a registered osteopathic physician in this Territory, and consulting any osteopathic physician residing on the border of a neighboring State and duly authorized under the laws thereof to practise, whose practice may extend into this Territory, and who does not open an office or appoint a place of meeting or receiving calls in this Territory, or any osteopathic physician duly registered in one county called to attend isolated cases in another county (*ib.*, s. 6).

Exemption of Osteopaths.—Practitioners of the science or system of treating diseases of the human body commonly known as osteopathy shall not be subject to the provisions of the act entitled "An act creating a board of health and regulating the practice of medicine";[1] and the provisions of this act shall not affect the right of persons now (March 17th, 1903) engaged in the practice of osteopathy in this Territory (*ib.*, s. 7).

Date of Operation of Osteopathic Act.—The act was to take effect from and after its passage and approval and the

[1] This law was repealed March 12th, 1903, before the present osteopathic law was passed or went into effect; and the law which superseded it was entitled "An act repealing chapter eight of the statutes of Oklahoma, 1893, establishing a board of health and for other purposes," Act 1903, c. 5.

appointment of a Territorial board of osteopathic registration and examination (*ib.*, s. 8), which was to be appointed within ten days after its passage (*ib.*, s. 1).

Osteopathy—Fees.—All fees are payable in advance to the treasurer of the board of osteopathic registration and examination. From person applying for certificate $10 (*ib.*, s. 2) (*ib.*, s. 3). To the register of deeds for recording a certificate $1 (*ib.* s. 5).

Oregon.[1]

Board of Medical Examiners consists of five persons, appointed from among the most competent physicians of the State, by the governor, all residents of the State for seven years and of at least five years' practical experience in their profession. Three of them are regulars, one eclectic, and one homœopathist (Law 1895, February 23d, p. 61, s. 1. Bellinger & Cotton's Codes and Statutes, 1902, s. 3,794[2]). They hold meetings for examination on the first Tuesday of January and July at Portland. Special meetings may be called by the board when in the opinion of a majority such meetings are necessary. The president and secretary have power to administer oaths. The board keeps a record of its proceedings and a register of all applicants for license, with his or her age, the time spent in study and practice of medicine and surgery, if they have so practised

[1] For an analysis of laws 1889, p. 144, a predecessor of the present law, see Miller *v.* Medical Board, 33 Or., 5; and State *v.* Randolph, 23 Or., 74; and Barmore *v.* Board, 21 Or., 301.

The power of the State to enact such laws regulating the practice of medicine and surgery as are calculated to protect the people from ignorant pretenders and charlatans has been established by repeated adjudications and is now too firmly settled to admit of doubt. State *v.* Randolph, 23 Or., 74.

As it is the right of the State to prescribe qualifications based on knowledge or professional skill, the State must be the judge of such qualifications; if the rule established to determine them is reasonable and appropriate for that purpose, it cannot operate to deprive any one of the privilege or right to practise his profession. State *v.* Randolph, 23 Or., 74.

The constitutionality of the Acts of 1889 (144) and 1891 (153) is examined and sustained in State *v.* Randolph, 23 Or., 74.

By adopting the act of 1889 (144) we adopted with it the construction which it received in the courts of the States whence it was taken (Missouri, Illinois); and the decisions of the courts of such States are authority here. Barmore *v.* Board of Medical Examiners, 21 Or., 301.

[2] Act February 25th, 1901, p. 119, provided that Bellinger & Cotton's Annotated Code and General Laws of Oregon, from and after their publication "shall be in force and shall be received in all the courts of the State as an authorized compilation of the Statutes of Oregon"; see n. 2, p. 448.

at all, and the name and location of all institutions granting to such applicants degrees or certificates of lectures in medicine or surgery, and whether such applicant was rejected or licensed under this act. Such books and register shall be *prima facie* evidence of all matters therein recorded (*ib.*, s. 2. Bellinger & Cotton, s. 3,795).

QUALIFICATION.[1]—Persons, except as below, desiring to practise medicine and surgery or either of them, in any branch,[2] shall make a written application to the board for a license, supported and accompanied by an affidavit of the applicant, setting forth the actual time spent in the study of medicine and surgery, and when, whether in an institution of learning,[3] its name and location, or if not, where and under whose tutorship, the time engaged in actual practice, if at all, of medicine and surgery or either, where located during such practice, and the age of the applicant at the time of the application; such application and affidavit to be filed and preserved of record in the office of the secretary of the board (Bellinger & Cotton, s. 3,796, as amd. Act 1903, p. 90).

EXAMINATION.—At the time and place designated by the board, or at its regular meeting, he shall be examined in anatomy, physiology, chemistry, materia medica, therapeutics, practice of medicine, surgery, obstetrics, diseases of women, medical jurisprudence, and such other branches as the board deem advisable. The examination is both scientific and practical, and of sufficient severity to test the candidate's fitness to practise medicine and surgery; it shall be by written or printed or partly written and partly printed questions and answers, and shall be filed and preserved in the office of the secretary of the board (*ib.*).

LICENSE.—After satisfactory examination,[4] the board shall

[1] See n. 1, p. 442.

[2] The right to practise medicine is a *privilege* which the legislature has constitutional authority to *grant* upon certain reasonably prescribed conditions. Before a person is entitled to the privilege, or can be said to have obtained it, he must comply with the statutory provisions or requirements; and if the privilege once existed, he may lose it by non-compliance with the new requirements. The requirements are conditions to the privilege. Miller *v.* Medical Board, 33 Or., 5.

[3] Whether a college be reputable or not is not a legal question but a question of fact. Barmore *v.* Board of Medical Examiners, 21 Or., 301; quoting from People *ex rel. v.* State Board of Dental Examiners, 110 Ill., 180.

[4] The board under the Act of 1890 is not authorized to grant a license upon diplomas from medical colleges alone without an examination of the applicant. Miller *v.* Medical Board, 33 Or., 5.

grant a license[1] to the applicant to practise medicine and surgery;[2] it can be granted only with the consent of at least four members, except as hereinafter provided (*ib.*).

FEE.—For examination, $10, to treasurer of board (*ib.*).

From practitioners from other States licensed under this act, $10, to treasurer of the board (*ib.*, s. 3,796).

REFUSAL, REVOCATION (see *infra*, same title).—The board may refuse[1] or revoke a license for unprofessional or dishonorable conduct,[3] but the applicant may appeal,[4] as hereinafter provided (*ib.*).

[1] To render such a law effective the power to grant certificates must be lodged in some recognized body of men learned in the science of medicine, with a supervisory power vested in the courts to review their acts if the discretion which the law gives them shall be abused. But before the courts will interfere, it must be made to appear that there has been an abuse of discretion. It is not enough that there may be found men in the same profession who would have decided the other way. Barmore *v.* Board of Medical Examiners, 21 Or., 301. A mandamus to compel the board to grant a graduate a certificate was refused where the board had found that the institution from which he was a graduate was not an institution in good standing, because it did not comply with the standing rule of the board defining the words, "medical institution in good standing" to be an institution requiring at least three regular courses or sessions of six months each, extending over a period of three years, for graduation. Barmore *v.* Board of Medical Examiners, 21 Or., 301.

[2] The board organized under the law of 1889 (a predecessor to the present law) had no power to issue a temporary license; and a temporary license, issued by said board for a limited period, was not a license issued in accordance with the law; and by the license, or by his own act of erasing the temporary limitation from it, the physician does not become a licensed practitioner; and upon presenting such altered license under the law of 1895, neither the board nor its clerk has the power to make a record showing him on its face to be a regularly licensed physician and surgeon. Volp *v.* Saylor, 42 Or., 546. A temporary certificate, issued by the board organized under the law of 1889, was not a regular license, though it recited that the person named therein had passed a satisfactory examination. Volp *v.* Saylor, 42 Or., 546. Although the physician upon passing a satisfactory examination may be entitled to a full license, if instead he gets a temporary license, his act of changing the certificate by erasing the temporary words cannot operate as an act of the board granting him what he applied for. Volp *v.* Saylor, 42 Or., 546.

[3] The revocation of the license of a former practitioner, to whom the former board had issued a temporary license in excess of its powers, and who erased the time limit and presented it to the secretary of the board and procured registration thereof, is not a revocation for dishonorable or unprofessional conduct, but the vacation of a void record. Volp *v.* Saylor, 42 Or., 546. Where a record is admittedly fraudulent, a court will not intercede to reinstate it, though it was vacated by a board whose functions are quasi-judicial and without notice. A court will not intercede to permit the physician to enjoy the fruits of his own wrong. Volp *v.* Saylor, 42 Or., 546.

[4] Practice on appeal from order of revocation, see State *ex rel. v.* Estes, 34 Or., 196.

The board may appeal from the Circuit to the Supreme Court in vindication of its own findings. State *ex rel. v.* Estes, 34 Or., 196.

FORMER PRACTITIONERS.[1]—All persons who have been regularly licensed[2] under former laws,[3] who have complied therewith,[4] shall be taken and considered as licensed physicians[5] under this act, and the secretary of the board is required to enter their names on his register as licensed physicians and surgeons on their written application accompanied by their said license (*ib.*).

PRACTITIONERS LICENSED IN OTHER STATES.—In all cases where an applicant for a license under this act shall produce

A direction by the president of the board to an attorney to take an appeal is a sufficient authorization, and the action of attorneys so authorized gives the Appellate Court jurisdiction. State *ex rel. v.* Estes, 34 Or., 196.

A question of defect of parties to such a proceeding cannot be raised for the first time on appeal. State *ex rel. v.* Estes, 34 Or., 196.

The proceeding is *quasi* criminal, and the State is properly a party; and having been served with notice of appeal, service on the relator or the board is not necessary to the jurisdiction of the Appellate Court. State *ex rel.* Estes, 34 Or., 196.

The Act of 1895 having made no provision for the recovery of costs in case the action of the board be reversed, the physician is not entitled to recover such costs on a reversal. State *ex rel.* Estes, 34 Or., 196.

An order of the Circuit Court, reversing a revocation by the board, is erroneous in directing that the physician be permitted to practise medicine and surgery in the State as if the verdict and decision of the board had not been rendered. It should not direct immediate reinstatement. The statute directs reinstatement in case of reversal, but only after the expiration of sixty days; and then in case no appeal has been taken. State *ex rel. v.* Estes, 34 Or., 196.

[1] Upon the failure of a former practitioner to comply with privileges of registration accorded by a statute for ninety days after its passage, he is not thereafter entitled to registration as a matter of right. Miller *v.* Medical Board, 33 Or., 5. See n. 2, p. 443.

[2] See n. 2, p. 444.

[3] The Supreme Court has no power after a board of medical examiners has ceased to exist to review its action in refusing a certificate to one entitled to it. Miller *v.* Medical Board, 33 Or., 5.

After a board is *functus officio* there is no way of subjecting its action to review. Miller *v.* Medical Board, 33 Or., 5.

[4] Where a board since defunct acted on a question, a new board has no right to review its action. Miller *v.* Medical Board, 33 Or., 5.

[5] In applying the former law (Act 1889, 144; 1891, 153), the court said that in providing that the fact of engagement in practice at the time of the passage of the act should be sufficient evidence of qualification to continue in practice, the State did not deny the privilege or right of practising medicine or surgery to any one; and that no class of citizens was prohibited from practice, provided they had the proper qualifications and complied with the law; that the act did not grant privileges or immunities. It merely established a rule of evidence. State *v.* Randolph, 23 Or., 74.

In providing that a physician or surgeon who had practised his profession in his State for ten years immediately preceding the passage of the act, the Act of 1889, the legislature merely declared that in its judgment such person was as well qualified as the student who had just received his diploma; and in adopting this exception the legislature infringed no provision of the State or federal Constitution. State *v.* Randolph, 23 Or., 74, distinguishing State *v.* Pennoyer, 65 N. H., 113.

and exhibit to the examining board a certificate from the board of medical examiners appointed under the laws of any State of the United States, which State recognizes licenses from this State, certifying to the fact that the person presenting such certificate is duly and well qualified to practise medicine and surgery in the State issuing such certificate, and that said board issuing said certificate has subjected the applicant to a thorough examination to ascertain this fact, he or she may, at the discretion of the examining board, upon paying the fee herein prescribed and otherwise complying with all the requirements of this act, *received* (*sic!*) from the examining board, provided for in this act, a license as if the examination of said applicant was had in this State; and upon filing such license with the county clerk as herein provided, he or she shall be a legally qualified practitioner of medicine and surgery in this State subject to all the provisions of this act as to the revocation of said license as herein provided (*ib.*).

DEFINITION.—"Unprofessional" or "dishonorable conduct"[1] means (1) procuring or aiding or abetting in procuring criminal abortion, (2) employing "cappers" or "steerers," (3) obtaining a fee on the assurance that a manifestly incurable disease can be permanently cured, (4) wilfully betraying a professional secret, (5) advertising of medical business in which untruthful and improbable statements are made, (6) advertising medicines or means whereby monthly periods of women can be regulated or the menses re-established if suppressed, (7) conviction of any offence involving moral turpitude, (8) habitual intemperance (Law February 23d, 1895, p. 63, s. 4; Bell. & Cott., s. 3,797).

REFUSAL, REVOCATION (see *supra*, same title).—The board is required to file a brief and concise statement of the grounds for such refusal or revocation in the office of its secretary, which, together with the decision of the board in writing, shall remain on record in the said office. Before a license can be revoked[2] for unprofessional or dishonorable conduct, a complaint of some person under oath must be filed in the office of the secretary of the board, charging the acts of unprofessional or dishonorable conduct and facts complained of against the licentiate accused,

[1] See State *v.* Jones, 18 Or., 256, for the construction of the law regulating and restricting the right of registered physicians to prescribe opium, morphine, etc.

[2] See n. 3, p. 444.

in ordinary and concise language, and thereupon the board shall cause to be served upon the accused a written notice and copy of such complaint, and the notice shall contain a statement of the time and place of hearing (*ib.*, s. 5; Bell. & Cott., s. 3,798).

Sections 5 and 6 (Bell & Cott. ss. 3,798, 3,799) regulate in detail the practice on revocation and appeals therefrom to the circuit court and a further appeal to the Supreme Court.[1] (The inquirer is referred to them for full information.)

Recording—Change of Residence—Death.—The licentiate shall file his license or a copy with the clerk of the county of his residence, who shall file the same and enter in a book a memorandum thereof, giving date of license and name of person to whom issued and date of filing, and he shall each year furnish to the secretary of the board a list of all certificates on file in his office, and on notice to him of change of location or death of person licensed or of revocation of license, the county clerk shall enter in the record a memorandum of the facts, so that the records kept by him shall correspond with the records of the board. In case the person licensed shall move into another county, he shall procure from the county clerk a certified copy of the license and file it with the county clerk of the new county, who shall file and enter it with the same effect as if it were the original (*ib.*, s. 7; Bell. & Cott., s. 3,800).

Definition, Exceptions.—Any person is regarded as practising who appends to his or her name the letters "M.D." or "M.B.," or for a fee prescribes, directs, or recommends[2] for the use of any person any drug[3] or medicine or agency for the treatment, care, or relief of any wound, fracture, or bodily injury, infirmity, or disease; but the act does not apply to dentists in the practice of their dental profession (*ib.*, s. 8; Bell. & Cott., s. 3,801).

Penalty.—Practising medicine or surgery after April 1st, 1895, without a license[4] or contrary to the provisions of the act,[5] is a misdemeanor, punishable with a fine of from $50 to $100, or imprisonment in a county jail from ten days to ninety

[1] See n. 4, p. 444.

[2] It is not easy to perceive what connection the licensing or taxing of itinerant vendors of drugs or nostrums has with the question of regulating the practice of medicine and surgery (*ob. dic.* on the constitutionality of the Act of 1889, as containing more than one subject). *Ex parte* Ferdon, 35 Or., 171.

[3] See n. 1, p. 446.

[4] See n. 2, p. 444.

[5] See n. 2, p. 443.

days, or both fine and imprisonment (*ib.*, s. 8; Bell. & Cott., s. 3, 801).

Prosecutions.—Justices of the peace and the respective municipal courts have jurisdiction of violations. County or district attorneys shall prosecute violations. In case of appeal to the Circuit Court, the district attorney of the county where the appeal is tried represents the board; and in case of appeal to the Supreme Court under the provisions of the act, the attorney-general represents the board on the appeal (*ib.*, s. 8; Bell. & Cott., s. 3,801).

Itinerant Vender.[1]—Any itinerant vender of any drug, nostrum, medicine, ointment, or appliance of any kind intended for the treatment of disease or injury, who shall by writing or printing, or any other method, publicly profess to cure or treat diseases, injuries, deformities, or ailments of any kind by any drug, nostrum, medicine, or other application, shall pay to the secretary of State a license of $100 per month. Violating the provisions of this section shall be a misdemeanor, punishable by a fine not exceeding $500, or imprisonment in the county jail not to exceed six months, or by both fine and imprisonment. Any license issued to a firm or company shall not permit it to transact business in different places at the same time.[2]

Pennsylvania.[3]

Medical Council.—The law provides for a medical council of the State (Act of May 18th, 1893, s. 1).

[1] See n. 2, p. 447.

[2] The Act of 1895 is complete in itself and operates as a repeal of the former act, including this section; therefore this section is repealed. And one arrested under it was discharged from custody on a writ of habeas corpus. *Ex parte* Ferdon, 35 Or., 171 (1899). Notwithstanding the above decision, the section has been republished in Bellinger and Cotton's Codes and Statutes, 1902, which, as shown in note 2, p. 442, is "an authorized compilation of the statutes of Oregon." Whether this revives it, query?

[3] A list of the former laws and the text of Acts of 1877, March 24th (42), and 1881, June 8th (72), will be found in vol. ii., Pepper and Lewis, "Digest," title, "Medicine;" but as the Act of 1893, May 18th (94), appears to be a complete regulation of the subject of licenses to practise after March 1st, 1894, their provisions are not abstracted here.

Act 1869, P. L. 1,067, was the earliest Pennsylvania act on the subject. Commonwealth *v.* Townley, 7 Pa. Dist. R., 413.

An analytic history of the legislation in Pennsylvania on this subject will be found in Commonwealth *v.* Townley, 7 Pa. Dist. R., 413.

The court does not sit on the wisdom of the law, but construes and interprets it according to its best judgment as controlled by the Constitution. Commonwealth *v.* Irving, 1 Susq. Leg. Chr., 69.

The council is to supervise the examinations conducted by the State boards of medical examiners for licenses to practise medicine and surgery, and issue licenses to applicants who shall have presented satisfactory and properly certified copies of licenses from the State boards of medical examiners or State boards of health of other States, or who shall have successfully passed the examination of one of the State boards established by this act (*ib.*, s. 5).[1] (See Appendix, p. 699.)

Boards of Medical Examiners.[2]—From and after March 1st, 1894, there are to be three separate boards of medical examiners, one representing the medical society of the State, one representing the homœopathic medical society of the State, and one representing the eclectic medical society of the State. Each board is to consist of seven members appointed by the governor from the full lists of the members of the said medical societies, and is to be composed exclusively of members of the same medical society.[3] Each appointee must be a registered physician in

[1] Act May 18th, 1893, is a valid and constitutional exercise of the police power of the State upon a subject plainly within that power, and urgently in need of control by it. *In re* Registration of Campbell, 197 Pa. St., 581.

Under the constitutional provision (art. 3, sec. 3) respecting the titles of acts, the title need not be an index of its content. The title of that act gives notice to any one entering practice that its provisions do or may concern him, and that is a sufficient compliance with the State Constitution in this respect. *In re* Registration of Campbell, 197 Pa. St., 581.

On constitutionality of similar act regulating the practice of dentistry, see Commonwealth *v.* Gibson, 7 Pa. Dist. R., 386.

[2] Act 1899, No. 148, authorizes medical colleges chartered by the State of Pennsylvania to confer "a diploma in public health" on any person holding a degree of medicine, after twelve months shall have elapsed between obtaining the medical degree and the examinations for the diploma in public health, and after at least one college year of practical instruction, after receiving his medical degree in the laboratory of hygiene connected with one of the medical schools of the State, or one of another State recognized as giving equivalent instructions. Examinations are upon practical and theoretical hygiene and chemistry, physics, geology, and bacteriology, as far as they pertain to hygienic investigations, sufficient to allow the health officer to draw correct conclusions from the reports of experts.

Under the Act of 1893 the board cannot determine which school or system of practice is right. Commonwealth *v.* Pierce, 10 Pa. Dist. R., 335.

[3] The Act of May 18th, 1893, by prescribing the qualifications for the office, and thereby limiting the choice of the governor (who under the State Constitution is the appointing power, art. 4, sec. 8, and art. 12, sec. 1) is not unconstitutional, as in creating the office the legislature has a right to prescribe the qualifications for the office. *In re* Registration of Campbell, 197 Pa. St., 581.

The Act of May 18th, 1893, is not special or local. It embraces the whole State, and applies to all persons of every school or system of medicine desiring to enter the practice. The designation of the three

good standing, and shall have practised medicine [1] or surgery under the laws of the State for not less than ten years prior to his appointment.

The governor is to fill vacancies and may remove a member for continual neglect of duties or on the recommendation of the medical society with which he may be in affiliation, for unprofessional or dishonorable conduct (*ib.*, s. 6).

Each of the boards is authorized to take testimony concerning all matters within its jurisdiction,[2] and the presiding officer of the boards or of any committee thereof may issue subpœnas and administer oaths to witnesses. Each of the boards may make rules and regulations for the transaction of their business not inconsistent with law, but subject to the approval of the Medical Council (*ib.*, s. 7).

EXAMINATIONS.[2]—For the purpose of examining applicants each board is to hold two or more stated or special meetings in each year after due public notice. A majority constitutes a quorum, but the examination may be conducted by a committee of one or more members authorized by the board (*ib.*, s. 9).

The boards, not less than one week prior to each examination, must submit to the council questions for thorough examination in anatomy, physiology, hygiene, chemistry, surgery, obstetrics, pathology, diagnosis, therapeutics, practice of medicine, and

medical societies from whose members the boards of examiners are to be selected is not the grant of any special or exclusive privilege to those societies, but a convenient method of securing a competent and qualified class from whom the examiners may be selected. *In re* Registration of Campbell, 197 Pa. St., 581.

If the designation of the three medical societies should be regarded as a special privilege to those societies, the act would not be unconstitutional. The board are State officers charged with the administration of the State's police power on the subject of admission to the practice of medicine. The provisions of Art. 3, sec. 7 of the State Constitution (prohibiting the grant to any corporation, association, or individual of any special or exclusive privilege or immunity) do not apply to such officers. The State may choose its own agents in its own way to carry out its commands in regard to the taxing or police or other general powers. *In re* Registration of Campbell, 197 Pa. St., 581.

[1] The word *medicine* in its common signification included, and yet with most of us includes all learning, having for its object the care and health and the cure of the ills of the human body (so stated in case which held that a college having full authority to teach all branches of *medicine*, includes within its authority the power to teach dental surgery and pharmacy, and by implication the power to certify by diploma or degree, the proficiency and qualification of the student in that particular branch of the main subject). Medico-Chirurgical College's petition, 190 Pa. St., 121.

[2] See n. 2, p. 449.

materia medica; and the council must select therefrom the questions for each examination, and such questions for each examination shall be the same for all candidates, except that in the departments of therapeutics, practice of medicine, and materia medica the questions shall be in harmony with the teachings of the school selected by the candidate (*ib.*, s. 10).

The examinations are to be in writing under rules prescribed by the council, and shall embrace the subjects named in section 10 (*supra*). After an examination the board having charge of it must act on it without unnecessary delay and transmit to the council an official report of its action, stating the examination average of each candidate in each branch, the general average, and the result, and whether successful or unsuccessful. The report must embrace all the examination papers, questions, and answers, which shall be kept for reference and inspection for not less than five years (*ib.*, s. 11).

Qualification and License.[1]—The council must forthwith issue to each applicant returned as having successfully passed said examination, and adjudged by the council to be duly qualified, a license to practise medicine[2] and surgery. The council must require the same standard of qualifications from all candidates except in therapeutics, practice of medicine, and materia medica, in which the standard shall be determined by the boards respectively. Before the license is issued, it must be recorded in a book in the office of the council, and the number of the book and page containing the record noted on the face of the license; the records shall have the same weight as evidence as that given to conveyance of land (*ib.*, s. 12). (See Appendix, p. 699.)

On and after July 1st, 1894, any person not theretofore[3]

[1] The State has the same right to protect its citizens from the consequences of ignorance and incapacity as from deception and fraud. The kind, nature, or extent of the qualifications must be left to the judgment of the State as expressed in its statutes. These are valid so long as the possession of these qualifications reasonably indicates the ability to practise medicine or a sufficient knowledge of the science and practice of medicine. It is only when these qualifications have no direct relation to the ability or capacity of the applicant to practise his profession that they will be construed to deprive one of his right to pursue a lawful vocation. Commonwealth *v.* Finn, 11 Pa. Sup. Ct., 620.

[2] See n. 1, p. 450.

[3] The Act of 1877 made the diploma from a chartered medical school duly authorized to confer upon its alumni the degree of doctor of medicine, the evidence upon which the courts might rely as to such qualifications. Commonwealth *v.* Irving, 1 Susq. Leg. Chr., 69 (1879) (Quarter Sess. Susq. Co.).

authorized to practise medicine [1] and surgery in the State may deliver to the secretary of the council a written application for a license with satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character,[2] has obtained a competent common-school education, and has received a diploma conferring the degree of medicine [3] from some legally incorporated medical college of the United States, or a diploma or license conferring the full right to practise all the branches of medicine and surgery in some foreign country.[4] Applicants who have received their degree in medicine after July 1st, 1894, must have pursued the study of medicine for at least three years, including three regular courses of lectures in different years in some legally incorporated medical college or colleges prior to the granting of said diploma or foreign license.[5] After July 1st, 1895, such applicants must have pursued the study of medicine for at least four years, including three regular courses of lectures, in different years, in some legally incorporated medical college or colleges, prior to the granting of said diploma or foreign license. Such proof shall be made, if required, upon affidavit, and if the council is satisfied with the same it shall issue to the applicant an order for examination before such one of the boards of examiners as the applicant may select. In case of failure at the exami-

[1] See n. 1, p. 450.

[2] The design of the Act of 1877 is protection of the people of the commonwealth and not to the business and practice of resident physicians. The first qualification of the practitioner is a good moral character. When a physician loses this he is no longer authorized to engage in this profession. Commonwealth *v.* Irving, 1 Susq. Leg. Chr., 69 (Quarter Sessions Susquehanna Co., 1879).

[3] See n. 2, p. 449.

[4] In Commonwealth *v.* Taylor, 1 Del. Co. R., 503 (see other reports of same case, p. 459, note 2), Woodward, J., points out that under the common law of England, seven years' apprenticeship were required from those desirous of following any trade, and an attempt to engage in the trade without serving the apprenticeship was made punishable under 5 Eliz., c. 4 (see 2 Blackst. Comm., 159, 197).

[5] The "three regular courses of lectures in different years, in some legally incorporated medical college or colleges" does not necessarily mean the regular three-years' course in such college. The act does not require that the entire three years shall be spent in one college. Where an applicant for examination has passed one year in one college (of pharmacy), and the next year at another college (of medicine), he attends the lectures in those branches of its first-year course which were not required or given at the first college; and during the same year he attends the second year's course of lectures at the second college, and the following year he takes the third year's course of lectures at the second college, he is entitled to an examination under this law, when he shall also, in addition to such attendance upon lectures, have studied medicine for at least one additional year. Opinion of McCormick, Atty.-Gen'l, April 17th, 1896; Medical Candidate's Requirements, 17 Pa. Co. Ct. Rep., 546; 5 Pa. Dist. R., 256.

nation the candidate, after the expiration of six months and within two years, shall have the privilege of a second examination by the same board without additional fee. Applicants examined and licensed by State boards of medical examiners or State boards of health of other States, on filing in the office of the medical council a copy of said license certified by the affidavit of the president and secretary of such board, showing also that the standard of acquirements adopted by said board is substantially the same as is provided by sections 11, 12, and 13 of his act, shall without further examination receive a license conferring on the holder all the rights and privileges provided by sections 14 and 15 (*ib.*, s. 13).

PROHIBITION.[1]—From and after March 1st, 1894, no person shall enter upon[2] the practice[3] of medicine[4] or surgery unless he

[1] The legislature has the power to enact laws by virtue of the police power of the State, to regulate and prescribe the qualifications of those who practise medicine and surgery. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628 (citing Dent *v.* State of W. Va., 129 U. S., 114; State *v.* Randolph, 23 Or., 74). See this case for an argument justifying the legislative interference.

It is not contended that the provisions of the Act of May 18th, 1893, are unreasonable, or impose unreasonable or unnecessary burdens, and its provisions are wisely adapted to its purposes to protect the public from unqualified and incompetent practitioners of medicine and surgery; and to secure that degree of skill and learning in the profession of medicine that the community might trust with confidence a practitioner licensed under its provisions. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521.

The purpose of the act is to protect the people from the dangers to life and health caused by incompetent practitioners of medicine and surgery, and to regulate the general practice of medicine in the State. It does not confer privileges, nor deprive or prevent any one from the practice of his profession if he be duly qualified. It simply provides a method by which the qualifications of a practitioner may be determined, and his qualifications duly certified by a competent board of examiners. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628 (citing, analyzing, and discussing—p. 528—Dent *v.* W. Va., 129 U. S., 114).

The right to practise medicine does not belong to a man as a citizen of the United States, but as a citizen of a State. This law denies no privileges or immunities to a citizen of the United States which are protected by the Fourteenth Amendment U. S. Constitution. Commonwealth *v.* Finn, 11 Pa. Sup. Ct., 620.

[2] The words to "enter upon" in the statute are not necessarily to begin. They may include "to engage in." An indictment, charging that the accused "did engage" in the forbidden practice sufficiently charges that he did "enter upon," within the meaning of the statute. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98 (this was the same Campbell whose registration was cancelled 197 Pa. St., 581; and who had twice before been acquitted of a similar charge).

[3] The title "doctor" may be used by a dentist who holds the degree of "doctor of dental surgery" from the Pennsylvania College of Dental Surgery. Thomas *v.* Thomas, 8 W. N. C., 375 (Com. Pl. No. 1, 1880), modifying an injunction which had enjoined defendant from using that title.

[4] In the case of First Church of

Christ, Scientist, in Philadelphia (20 Pa. Co. Ct. R., 241; 6 Pa. D. R., 745; 41 Pa. W. N. C., 259; 11 York, 132; 3 Lack. L. N., 341), Pennypacker J. in Common Pleas No. 2, Philadelphia Co., refused to grant a charter to the proposed corporation because it proposed not only to inculcate a creed and promulgate a form of worship (which being a private belief was, under the Constitution of Pennsylvania, not under public control), but to establish a prescribed method of practising the art of healing the diseases of the body, to be carried into effect by persons trained for the purpose who might receive compensation for their services; and this he regarded as in conflict with Act, March 24th, 1877, which provided that those who should practise medicine, surgery, or obstetrics should receive in a regular manner a diploma from a chartered medical school duly authorized to confer upon its alumni the degree of doctor of medicine; while to grant this charter would be to sanction a system of dealing with disease totally at variance with any contemplated by the act, and different from any taught in a chartered medical school. *Cf.* State *v.* Biggs (N. C.), p. 405, n. 2, *et seq.*

The object of the act (1877) is to provide that for the practice of an art so difficult and abstruse as the treatment of disease, the person so employed must have had the benefit of the learning and experience of the past, so far as it can be given by teaching in the medical schools. It establishes a policy for the commonwealth which the courts must be careful not to thwart. *In re* First Church of Christ, Scientist, in Philadelphia, 20 Pa. Co. Ct., 241 (1897); see other reports of this case cited above this note.

The remedy of the Christian Scientists against the law is, after a period of test and trial, to convince the people of the error of their course, and then some day a future legislature may repeal the act; but for the present (1897) its policy must be enforced. Pennypacker, J., in First Church of Christ, Scientist, *supra*, this note.

The statements of the Christian Science doctrines (as quoted at length in the opinion), to the effect that disease does not exist, that the so-called laws of health are simply laws of mental belief, that sickness should not be recognized by man as reality, that man is never sick, that when disease is once destroyed in mind it is thoroughly cured, are palpable fallacies. As long as they are inactive beliefs they may do no harm. When they are put into practice they are pernicious and injurious to the community (opinion of Arnold, P. J., C. P. No. 4, Phila. Co., 1902; First Church of Christ, Scientist, 11 Pa. Dist. R., 573, quoted in report of First Church of Christ, Scientist, 205 Pa. St., 543, 1903).

The law is not designed to compel the use of any particular remedies, or of any remedies at all, but only to secure competent service for those who desire to obtain medical attendance. First Church of Christ, Scientist, 205 Pa. St., 543.

In refusing a certificate of incorporation to the First Church of Christ, Scientist, the court does not consider the matter from either a theological or metaphysical standpoint, but only in its practical aspects. First Church of Christ, Scientist, 205 Pa. St., 543.

The consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither law nor reason has any objection to the offering of prayer for the recovery of the sick; but in many cases both law and common sense require the use of other means, which have been given to us for the healing of sickness and the cure of disease. First Church of Christ, Scientist, 205 Pa. St., 543.

Under the well-defined policy of the law of Pennsylvania (in 1903) there is no abuse of the discretion committed to adjudge in passing upon a proposed charter of incorporation, to refuse it on the ground that what the good of the community requires under the law as it exists ought not to be imperilled by the incorporation of a group of citizens whose fundamental doctrine is, that the public good requires no such thing. First Church of Christ, Scientist, 205 Pa. St., 543.

A charter will not be granted to an institution for instruction in electric-

has complied with this act [1] and shall have exhibited to the prothonotary of the court of common pleas of the county in which he desires to practise [2] a license duly granted, which shall entitle him to be duly registered in the office of such prothonotary. [3]

ity as a curative agent with power to confer degrees in medicine or electricity. Such qualification for the practice of medicine does not meet the standard required by Act March 24th, 1877 (a predecessor of the present law). *In re* American Electropathic Institute, 14 Phila., 128; 37 Leg. Int., 262 (1880); 9 W. N. C., 31.

Whatever may be the value of electricity and magnetism as curative agents, a knowledge of their principles in their application to disease does not comprehend the degree of learning which the law and the interests of society require in a practitioner of medicine. *In re* American Electropathic Institute, 14 Phila., 128; 37 Leg. Int., 262; 9 W. N. C., 31.

The court in the American Electropathic Institute case (14 Phila. 128; 37 Leg. Int., 262; 9 W. N. C., 31) refused also to grant a charter authorizing the institute to grant degrees in electricity, on the ground that it still would sustain the character of a medical college; and while its course of instruction was thus limited it was liable to become a source of danger to the community.

When persons who make a business of practising the art of healing with or without medicine (*e.g.*, Christian Scientists) are not regular and registered physicians, they violate the law which was intended to prevent the practice of medicine by nonqualified persons. *In re* First Church of Christ, Scientist, Philadelphia, 11 Pa. Dist. R., 573 (Arnold P. J., C. P. 4, Phila. Co.).

This is a penal statute. Its words should be given their popular rather than their technical meaning. Commonwealth *v.* Pierce, 10 Pa. Dist. R., 335.

The practice of osteopathy without a license is not a violation of the law (citing Nelson *v.* State Board of Health, Ky., see p. 277, note 2, *supra*; Smith *v.* Lane, 24 Hun., 632, *supra*, p. 389, note 1; State *v.* Lefring, 61 Ohio, 39, *supra*, p. 428, note 5; State *v.* Mylod, 40 Atl. R., 753; *infra*, p. 469, note 3). Commonwealth *v.* Pierce, 10 Pa. Dist. R., 335; to same effect, Commonwealth *v.* Thompson, 10 Pa. Dist. R., 634.

If the statute applies to an osteopath it applies to trained nurses and all others of that class who for compensation administer to the wants of the sick. Commonwealth *v.* Pierce, 10 Pa. Dist. R., 335.

[1] The gist of the offence is the practice of medicine and surgery by an unregistered, and hence presumptively, an unqualified person. If an indictment will lie only for beginning such practice, the statute may be disregarded with impunity after the statute of limitations has closed on the initial offence [implying that such a construction would be an absurdity]. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

[2] A physician, lawfully registered in one county, who opens an office in another where he advertises for patients, and to which he comes at regular intervals and there treats all who ask for his services, is practising medicine in the latter county and (under the Act of 1881) should be lawfully registered in the latter county before practising there. He is a *sojourner* in the latter county, and the act (1881) puts residents and sojourners on the same footing. Commonwealth *v.* Ege., 1 Pa. Co. Ct. R., 483; 3 Lanc. L. R., 111—affd. 20 W. N C., 73.

Sojourner in the law of 1881 is used in place of longer phrases in earlier acts (1869, 1,067; 1870, 353, etc.; 1873, 147 and 550), but refers to the same class of phrases. Commonwealth *v.* Ege., 1 Pa. Co. Ct. R., 483; 3 Lanc. L. R., 111.

[3] The provision for registration in sec. 14, by implication means entry of record in the book required by the prior acts (March 24th, 1877, June 8th, 1881), to be kept by the prothonotary and known as the medical register of

PENALTY.—Violating the provisions of this act[1] shall be a misdemeanor, punishable with a fine of not more than $500 for each offence (*ib.*, s. 14).

the county. While this register is not a judicial record, it is a public record, put from motives of public policy under the sanction and control of the court. The medical register is of the class of administrative or executive records which have been put under the jurisdiction of the courts. It is a public record of matters of public interest and concern, directed to be kept open and accessible for the information of the public, and the duty of so keeping it is imposed on the prothonotary as an officer of the court. It is an official act enjoined by the law on an officer of the court; and in the performance of his duty he is necessarily subject to the orders and control of the court. If a licensed physician applying for registration should be refused without good reason, the court on mandamus or by summary order would compel its officer to perform the duty laid on him by statute; and if he has, through misinformation, made an erroneous entry not warranted by law, the court has power to compel its amendment or cancellation. *In re* Registration of Campbell, 197 Pa. St., 581.

The object of the statute in putting the medical register in charge of the court's officer was at least partly to give it the sanction of the court on which the public could safely rely. *In re* Registration of Campbell, 197 Pa. St., 581.

It is essential to such sanction that the court should have the same summary power over the register that it has over its strictly judicial records to keep it clear of falsehood, intentional or accidental, and to see that it has the verity which the court's sanction imports. The inherent power of the court over its own records for this purpose is unquestionable, and may be exercised summarily on its own motion or on the suggestion of any one as *amicus curiæ*. And the fact that one who petitions to strike from the record the name of a physician not entitled to be registered, has no personal interest in the matter is wholly immaterial. *In re* Registration of Campbell, 197 Pa. St., 581.

The fact that one had been acquitted by a jury at quarter sessions on a charge of violating the medical act is entirely irrelevant in a proceeding to cancel his registration on the medical register; nor would a conviction have cancelled the registration. At most it would have been evidence on which the court could correct its own record. *In re* Registration of Campbell, 197 Pa. St., 581.

[1] It was indicated in Commonwealth *v.* Pierce, 10 Pa. Dist. R., 335, that where an osteopath administered medicines, and introduced a sound, he might be guilty of a violation of this law. See note to Commonwealth *v.* Thompson, 10 Pa. Dist. R., 634. See n. 4, p. 453, on p. 455, *supra*.

The penal provisions of the Act of 1881, June 8th, with respect to practising under a false or forged diploma, and of the Act of 1877, March 24th, respecting practising without a diploma, and of the act requiring the license of itinerant physicians will be found in vol. i., Pepper and Lewis "Digest." title "Crimes," ss. 518, 519, 520; but they are not abstracted here because it would seem that the repeal of inconsistent acts and parts of acts by Act 1893, May 18th, s. 17, repealed these provisions.

For the practice on proceedings to strike a name from the medical register see *in re* Registration of Campbell, 197 Pa. St., 581 (1901).

Evidence of previous acquittals, if it is evidence of anything, merely proves that at the time of the alleged offences there charged, the accused had not then entered upon or engaged in practice. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

For practice on an information charging a violation of this act, see Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

An information for violating the act need not negative matters of de-

EXCEPTIONS.[1]—The act does not interfere with or punish commissioned medical officers serving in the army or navy of the United States, or its marine hospital service, while so commissioned,[2] or medical examiners of relief departments of railroad companies[3] while so employed, or any one while actually serving as a member of the resident medical staff of any legally incorpo-

fence arising from statutory exceptions. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

Where an indictment sets forth an offence subsequent to a former acquittal and the evidence is confined to subsequent violations of the statute, pleas of *autrefois acquit* are not sustained by proof of acquittal at a time previous to the offence charged. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

On a trial for a violation of this act, it is the duty of a jury to give a verdict in accordance with the evidence and charge of the court, and not upon their own view of justice. Commonwealth *v.* Campbell, 22 Pa. Sup. Ct., 98.

The burden of proof is on the Commonwealth to show that the defendant has practised medicine, surgery, or obstetrics. Commonwealth *v.* Irving, 1 Susq. Leg., Chr. 69.

In Bauer's appeal (Supr. Ct.), 2 Sadler Pa. Supr. Ct. Cases, 69, 17 W. N. C., 394 (1886), the court, refusing to say that Act June 8th, 1881, was unconstitutional, affirmed the order striking Bauer's registration from the record. See Bauer's Case below, 16 W. N. C., 538.

[1] The law does not grant privileges or immunities to any one, and does not violate cl. 7, art. 3, Pa. Const. It operates alike upon all citizens and they are all permitted to comply with its provisions. Commonwealth *v.* Finn, 11 Pa. Super. Ct., 620.

[2] A medical officer, commissioned by the Government of the United States, serving in the army or navy or in the Marine Hospital Service, while so commissioned cannot be regarded as a general practitioner of medicine and surgery as contemplated by the act; and cannot therefore be regarded as in the same class with a practitioner who is required to secure a license under the act. This act is therefore not unconstitutional as discriminating against the latter. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628.

The legislature has the power to provide that the fact that a physician is commissioned by the United States Government to serve in the army, navy, or Marine Hospital Service, shall be sufficient evidence of his competency to practise while so commissioned. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628, citing Dent. *v.* State, 129 U. S., 114; *ex parte* Spinney, 10 Nev., 323.

There is no language in the act that authorizes commissioned medical officers of the United States to enter upon the public practice of medicine; on the contrary, it is plain that it was intended they should not. Commonwealth *v.* Finn, 11 Pa. Sup. Ct., 620.

So also of the medical examiners of railroad relief departments and the resident staff of hospitals. These are confined to a much narrower field than the public of the entire commonwealth, which is the sphere of the licensed practitioner; so also of surgeons of neighboring and other States. In all these respects the law is not a violation of that provision of the Fourteenth Amendment of the U. S. Constitution in regard to the equal protection of the laws. Commonwealth *v.* Finn, 11 Pa. Sup. Ct., 620.

A law operating more harshly upon domestic citizens than citizens of other States does not necessarily violate the U. S. Constitution. Commonwealth *v.* Finn, 11 Pa. Super. Ct., 620.

[3] Medical examiners of relief departments of railroad companies, and those serving as members of the resident medical staff in hospitals, are

rated hospital, or any legally qualified and registered dentist exclusively engaged in the practice of dentistry,[1] nor interfere with or prevent the dispensing and sale of medicine or medical appliances by apothecaries [or] pharmacists, nor interfere with the manufacture of artificial eyes, limbs, or orthopædical instruments or trusses of any kind *for* (*sic!*) fitting such instruments on persons in need thereof, or any lawfully qualified physicians and surgeons residing in other States[2] or countries meeting registered physicians of this State in consultation, or any physician or surgeon residing on the border of a neighboring State[3] and duly authorized under the laws thereof to practise medicine and surgery therein, whose practice extends into the limits of this State,[4] provided such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of Pennsylvania, or physicians duly registered in one county of this

not regular practitioners of medicine or surgery, and are consequently not in the same class with regular practitioners; and the exemption of the former is not an unconstitutional discrimination against the latter. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628.

[1] Where an act (regulating the practice of dentistry) excepted those who had been engaged in the practice of dentistry for three years before its passage, and physicians and surgeons, and then required all others to be the holders of diplomas, or to procure a certificate from the board of dental examiners, the Court (Quarter Sessions York Co., 1882), after saying that the regulation of the practice was within the power of the State, *held* that the law in its application to one who was in practice at the time of its passage, but not one of the excepted classes, deprived him of his property in his profession without due process of law, and that it was also *ex post facto* (see the discussion as reported. Commonwealth *v.* Wasson, 29 Pitts. Leg. J. [O. S.], 434; 2 York Leg. Rec., 211, Wickes, P. J. See note 2, p. 459).

[2] The exception of a lawfully qualified physician from another State does not invalidate the act. Commonwealth *v.* Wilson, 19 Pa. Co. Ct., 521; 6 Pa. Dist. R., 628.

[3] The exception of physicians on the border of neighboring States is very near the border line of an infringement of the Fourteenth Amendment of the United States Constitution; but the restrictions, which prohibit them from opening an office or appointing a place to meet patients in Pennsylvania, and requiring them to be duly qualified under the laws of their own State, remove them from the class of general practitioners. Then, too, it appears that the exception was intended to meet the needs of those who, residing in the State, and near its border, would be compelled to call in a physician from another State or go without medical aid or the services of a physician. This exception is not unreasonable, nor such a discrimination against pursuit of the same occupation or profession as makes the act unconstitutional and void. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628.

[4] The exceptions, except the last one, relate to special and temporary employment. The last is placed under such restrictions that such physicians do not have the same privileges and immunities as a duly licensed practitioner. Commonwealth *v.* Wilson, 19 Pa. Co. Ct. R., 521; 6 Pa. Dist. R., 628.

State called to attend cases in another, but not residing or opening an office therein.[1]

The act does not prohibit the practice of medicine and surgery by any practitioner who shall have been duly registered before March 1st, 1894, according to the Act of June 8th, 1881,[2] and one such registration shall be sufficient warrant to practise medicine and surgery in any county (*ib.*, s. 15).[3]

Former Laws.—All acts or parts of acts inconsistent with this are repealed (*ib.*, s. 17).[3]

Irregular Registration.—The Act of 1897, July 9th (216, s. 1) authorized physicians, who theretofore had medical diplomas issued to them by a reputable college in another State or foreign country, whose diploma was improperly registered under Act of June 8th, 1881,[4] to appear before the proper board of

[1] See p. 455, n. 2.

[2] A physician's profession is property (citing *ex parte* Steinman and Hensel, 95 Pa., 220); a law which excluded him when already lawfully in practice from further practice by imposing additional qualifications, would deprive him of property without due process of law (citing Norman *v.* Heist, 5 W. & S., 171). Commonwealth *v.* Townley, 7 Pa. Dist. R., 413, see *contra* p. 420, n. 3. See note 1, p. 456.

The exception of residents of this State who have practised five years continuously before the passage of the act is unconstitutional (art. 4, s. 2, U. S. Const.), so far as it excludes citizens of other States from the same privilege; and citizens of other States engaged in such continuous practice are entitled to the same exemption. Commonwealth *v.* Irving, Susq. Leg. Chr., 69 (Quart. Sess. Susq. Co., 1879).

Act June 8th, 1881, was not an *ex post facto* law (distinguishing *ex post facto* and retrospective laws). It only punished violations committed after its passage, in continuing to practise. It was in all respects valid and constitutional. Commonwealth *v.* Taylor, 1 Del. Co. R., 503 (Quart. Sess. Luz. Co., 1883); 2 Kulp., 364; 4 York Leg. R., 79; 12 Luz. L. R., 182. See Bauer's appeal, n. 1, p. 456, or p. 457.

[3] See p. 448, n. 3.

[4] Under the Act of 1893 one registration before the 1st of March, 1894, according to Act June 8th, 1881, is sufficient to entitle the physician so registered to practise medicine and surgery in any county in the Commonwealth. Under this provision a physician properly registered in Pittsburg could recover for services rendered in Philadelphia. Fishblate *v.* McCullough, 9 Pa. Sup., 147; 43 W. N. C., 376—affg. 7 Pa. Dist. R., 364; to same effect Commonwealth *v.* Townley, 7 Pa. Dist. R., 413. See n. 2, p. 455.

The Act June 8th, 1881, requiring the indorsement of the diploma of a physician from another State or foreign country, by the faculty of a medical college or university in this State, constituted such faculty a tribunal with authority to examine not only the diploma but the person presenting it; and their judgment was conclusive, and the only evidence upon which a prothonotary was authorized to register any applicant. The prothonotary's business was purely clerical, and he could dispense with nothing which the law required. When the required indorsements were missing he had no right to inquire into the reasons. He should have refused to register it. The indorsements should appear on the back of the instrument. The indorsement of a dean of a medical faculty must appear to be the act of the faculty. If the faculty refuses to do its duty, the remedy is against it by mandamus.

examiners at the next meeting after the passage of the Act of 1897, and properly qualify under existing laws, their diplomas[1] in such cases being made valid for all purposes, with the same effect as if the previous registry had been properly made; and their practice was validated from the date of its registry. All inconsistent laws were repealed (*ib.*, s. 2).

Transient Practitioners.[2]—A person who attempts to practise medicine or surgery, either for a valuable consideration or without any charge or remuneration, by opening a transient office in the State, or who by handbill or other form of written or printed advertisement assigns such transient office or other place to persons seeking medicine or surgical advice or prescription, or who itinerate from place to place or from house to house and propose to cure any person, sick or afflicted, by the use of any medicine, means, or agency whatsoever, either for a valuable consideration or without any charge or remuneration, shall, before being allowed to practise in this manner, appear before the clerk of the court of quarter sessions of the county where he desires to practise,[3] and furnish satisfactory evidence to the clerk that the provisions of *this act*[4] have been complied with, and shall in

The physician is not entitled to register merely because the faculty refuses to act. Neither the prothonotary nor the medical institution has a right to devise a method not authorized by law, and a registration improperly made in consequence should be cancelled. *In re* Registration of a Physician (John L. Bauer), 16 W. N. C., 538 (1884); 2 Del. Co., 166.

[1] See n. 2, p. 459.

[2] The Act of March 24th, 1877, sec. 4, providing that transient or itinerant practitioners of medicine or surgery shall take out licenses and pay a fee therefor into the county treasury is not repealed by the Act of June 8th, 1881, which provides for the registration of all practitioners of medicine and surgery, as the two are not inconsistent, but one is merely supplementary to the other. Moore *v.* Bradford Co., 148 Pa., 342. (Peebles *v.* Wayne Co., 10 Pa. Co. R., 69, to the contrary is therefore overruled.)

An office opened by a physician in another county than his residence, but having all of the elements of permanency, is not a transient office, and such a physician does not require a transient license under sec. 4, Act March 24th, 1877, as amended by Act July 12th, 1897. Commonwealth *v.* Townley, 7 Pa. Dist. R., 413, distinguishing Moore *v.* Bradford Co., 148 Pa., 342, *supra* this note, and Ege *v.* Commonwealth, 20 W. N. C., 73, *supra* p. 455, n. 2.

[3] The views of Seely, P. J., in Peebles *v.* Wayne Co., 10 Pa. Co. Ct. R., 69 (which was overruled in effect by Moore *v.* Bradford Co., 148 Pa. St., 342, see n. 2, *supra*) may be consulted by those who desire to know the duties of the clerk of quarter sessions under this act. Judge Seely thought that the Act of 1877 prescribed a condition for a license to practise medicine, and the Act of 1881 an entirely different condition for the practice of medicine; and that the latter act, therefore, necessarily repealed the former, and that a license issued after the passage of the Act of 1881 under Act 1877 to an itinerant would not protect the licensee from the penalties of the Act of 1881.

[4] *This act* is the Act of 1877, March

addition take out a license for each day and pay into the county treasury $10; and it shall be the duty of the clerk to issue to such applicant a proper certificate of license on payment of $5. (Law 1897, July 12th, 257, s. 1, amending s. 4, Act 1877,[1] March 24th [although it would seem that the Act of 1877 had been repealed by sec. 17 of the Act of 1893 above], and repealing [sec. 2] all inconsistent acts and parts of acts.) (Appendix, p. 699.)

Manufacturers and Vendors of Patent Medicines.—These are deemed dealers in merchandise for the purpose of license taxation. (Act 1883, June 5th, vol. ii., Pepper and Lewis "Digest," title "Mercantile Licenses," s. 20 *et seq.*).

Fees.—To the secretary of the council, upon application for a license, $25.

To the medical council, upon application for a license by licensees in other States, $15 (*ib.*, s. 13).

To the prothonotary, upon exhibition of a license, for registry, $1 (*ib.*, s. 14).

Porto Rico.[2]

Board of Examiners.—This board, appointed by the governor with the advice and consent of the Executive Council, consists of five learned, skilled, and capable physicians who have been residents of the Island of Porto Rico for not less than five years preceding their appointment (Act of Legislative Assembly, 1903, March 12th, s. 1).

Three members constitute a quorum; the president and secretary have power to administer oaths and the board to take testimony in all matters relative to its duty under this act. The board holds meetings for examinations at the seat of government on the first Tuesdays of April and October, and at such other times and at the same and other places as the board may determine. The board keeps a record of its proceedings, and a register of all applicants for a certificate, with the age of the applicant, time spent in the study of medicine, and the name and location of all the institutions granting to such applicant degrees

24th, of which the Act of 1897 amends sec. 4; but the Act of 1877 appears to have been repealed by sec. 17 of the Act of 1893 above.

[1] See n. 1, p. 456.

[2] By the organic act (Act of Congress, April 12th, 1900) it is provided that all laws enacted by the legislative assembly of Porto Rico shall be reported to the Congress of the United States, which reserves the power and authority, if deemed advisable, to annul the same.

or certificates of lectures attended in medicine or surgery. The register shall show whether the applicant was rejected or has received a certificate under this act, and shall be *prima facie* evidence of all the matters therein kept.

QUALIFICATION.—Every person *hereinafter* (*sic!*) wishing to practise medicine or surgery or any of the branches thereof or midwifery in any of their departments in this island shall apply to the board for a certificate or license. Applications are in writing, accompanied by proof that the applicant is a graduate of a medical school or institution in good standing and legally organized, and duly approved by said board; if the diploma is found genuine, which the board shall determine, and if the person presenting and claiming the diploma be the person to whom it was originally granted, at a time and place designated by the board or at a regular meeting of the board, the applicant shall take an examination embracing those general subjects and topics, a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine by respectable medical colleges in the United States.

The examination of those who desire to practise midwifery or any of the branches of medicine and surgery shall be of such a character as to determine the qualifications of the applicants to practise them (*ib.*, s. 3).

EXAMINATIONS.—All examinations provided in this act shall be conducted under rules and regulations prescribed by the board, which shall provide for a fair and wholly impartial method of examination (*ib.*).

CERTIFICATE — LICENSE. — After examination the board shall, if the candidate has been found qualified, grant a certificate or license to such candidate to practise medicine and surgery, or any of the branches thereof, or midwifery in Porto Rico. The certificate can only be granted by the consent of not less than three members of the board. All physicians and surgeons holding certificates granted by the *now* existing (March 12th, 1903, to take effect May 1st, 1903) board of medical examiners are exempt from the provisions of this section (*ib.*, s. 3).

REFUSAL—REVOCATION.—The board may refuse to grant a certificate on account of unprofessional, dishonorable, or immoral conduct. Before a certificate can be refused for said cause, the board must serve in writing on the applicant a copy

of any charge or charges against him, and appoint a day for hearing, at which the applicant or any witness in his behalf may appear and give testimony in refutation of such charges. In case the board after such hearing shall refuse a certificate to the applicant, the decision specifically stating the grounds upon which such refusal was made shall be reduced to writing and the copy delivered to the applicant on his demand. On like hearing the board may refuse a certificate to any one who may publicly profess to cure or treat disease, injury, or deformity in such a manner [as] to deceive the public. The hearing shall take place twenty days after the service of the copy of the charges on the applicant, unless further time is granted to the applicant, and the decision of the board shall not be later than ten days after the day of hearing. The board shall have power to revoke a certificate or license in cases of unprofessional, dishonorable, or immoral conduct. Before revoking any certificate or license, a written complaint specifically stating the charges shall be delivered to all the members of the board, and a copy be served on the accused twenty days before the time fixed by the board for the hearing. The board must fix the time; and the person whose license is to be revoked may produce testimony in refutation of such charges. After such hearing the decision of the board shall be specifically stated in writing, and a copy thereof delivered on demand to the person under charges (*ib.*, s. 4).

RECORD.—Every recipient of a certificate must within sixty days from its date have it recorded in the office of the secretary of Porto Rico and in the office of the superior board of health. The said secretary and the president of said board of health must indorse on the certificate the date of record (*ib.*, s. 5).

EXCEPTIONS.—Applicants who possess diplomas from reputable medical colleges, and who have been licensed by state boards, may on payment of $25 be licensed by the board without examination if the board so decides. Medical officers serving in the army and navy of the United States, or in the United States marine hospital service, are exempt from examination, but are required to be registered by the superior board of health and to pay a fee of $5[1] (*ib.*, s. 6).

[1] Query, whether the legislative assembly has this power to require the registration of United States officers, and the payment of a fee by them?

Offence—Penalty.—To practise medicine or surgery, or any other branches thereof or midwifery within the island contrary to the provisions of this act, is for each violation a misdemeanor, punishable by a fine from $50 to $500, or by imprisonment from thirty to ninety days, or by both fine and imprisonment (*ib.*, s. 7).

Definition.—Any person is regarded as practising within the meaning of this act who appends the letters M.D. (for medical doctor) to his or her name, who professes publicly to be a physician or surgeon, or who recommends, prescribes, or directs for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or bodily injury, or other deformity, after having received, or with the intent to receiving therefore, either directly or indirectly, any bonus, gift, or compensation (*ib.*, s. 7).

Fees.—For examinations and a certificate: for examination in medicine and surgery, $10; for a certificate, if issued, $5; for all other practitioners $5 for examination and $5 for a certificate, if issued; for an examination in midwifery $5, and $3 for a certificate if issued. All payable in advance to the treasurer of the board (*ib.*, s. 8).

Any one failing to pass the required examination shall be entitled to a second examination within six months without fee (*ib.*).

To the secretary of Porto Rico and the president of the superior board of health for the record of certificate under sec. 5, the usual fees for such services to be paid by the applicant (*ib.*, s. 5).

From applicants admitted without examination under sec. 6, $25 (*ib.*, s. 6).

From medical officers serving in the army and navy of the United States or in the United States marine hospital service $5 [1] (*ib.*, s. 6).

Transfer of Archives — Repeal, etc. — The act provided for the transfer of the archives and utensils of the latter sub-delegation of medicine, and its documents, to the medical board of examiners (*ib.*, s. 10); it repealed all conflicting acts, orders, and parts thereof (*ib.*, s. 11). It took effect from and after May 1st, 1903 (*ib.*, s. 12).

[1] See note, p. 463.

Rhode Island.[1]

Registration—Offence.—It is unlawful [2] for any person to practise medicine [3] or surgery in any of its branches, who has not exhibited and registered in the city or town clerk's office of the city or town in which he or she resides his or her authority for practising, with age, address, place of birth, and the school or system of medicine to which he or she proposes to belong; and the person registering shall subscribe and verify by oath before such clerk an affidavit containing such facts, which, if wilfully false, shall subject the affiant to conviction and punishment for perjury (Gen. Laws 1896, c. 165, s. 2).

Authority.[4]—Authority to practise medicine shall be a cer-

[1] The object of the statute is to secure the safety and protect the health of the public, not from theories, but from the acts of incompetent persons. It is not for the purpose of compelling persons suffering from disease to resort to remedies, but is designed to secure to those desiring remedies competent physicians to prepare and administer them. State *v.* Mylod, 20 R. I., 632, citing Smith *v.* Lane, 24 Hun, 632.

In State *v.* Mylod, 20 R. I., 632, State *v.* Anthony, 20 R. I., 644, and State *v.* Taft, 20 R. I., 645, the court found it unnecessary to pass upon the constitutionality of this law.

[2] A defendant cannot question the constitutionality of a statute unless his rights would be affected by its enforcement. State *v.* Mylod, 20 R. I., 632.

[3] Medicine in the popular sense is a remedial substance. The practice of medicine as ordinarily or popularly understood has relation to the art of preventing, curing, or alleviating disease or pain; it rests largely in the sciences of anatomy, physiology, and hygiene; it requires a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations. And further it requires a knowledge of drugs, their preparation and action. Popularly, it consists in the discovery of the cause and nature of disease and the administration of remedies or the prescribing of treatment therefor. Prayer for those suffering from disease, or words of encouragement, or the teaching that disease will disappear and physical perfection be attained as a result of prayer, or that humanity will be brought into harmony with God by right thinking and a fixed determination to look on the bright side of life, does not constitute the practice of medicine in the popular sense. State *v.* Mylod, 20 R. I., 632; *cf.* Pa. cases, First Church of Christ, Scientist, p. 453, note 4.

[4] In Paquin *v.* State Board of Health, 19 R. I., 365, the Supreme Court affirmed the action of the board in determining that the applicant had not presented satisfactory evidence that he had been in practice a sufficient time prior to January 1st, 1892, and with sufficient success to have acquired an honorable reputation in the community as a practitioner, which the court held was requisite to those who sought to take advantage of the second qualification under the law, as it existed at that time.

Where the State Board of Health issued certificates to graduates of the Medical Department of the Laval University, Montreal, Canada, who presented a license from the College of Physicians and Surgeons of that province, and the evidence showed that the College of Physicians and Surgeons issued such license as a matter of course on application to graduates of Laval University, *held*

tificate from the STATE BOARD OF HEALTH, and the board shall on application after examination issue a certificate to any reputable physician who intends to practise medicine or surgery in the State, and who presents himself before the state board of health and passes in a satisfactory manner such examination as the board may require (*ib.*, s. 3, as amd. Act 1901, c. 926).[1]

ITINERANT DOCTOR.—Nothing herein is to be construed to authorize any itinerant doctor to register or practise medicine in any part of the State[2] (*ib.*, s. 4).

MEDICAL BOARD.—The members of the board are severally authorized to administer oaths, and the board, in all cases or proceedings pending before it, is authorized to summon witnesses by subpœna signed by its secretary, and to compel witnesses to attend and testify; and the board is authorized to compel the production of all papers, books, documents, records, certificates, or other legal evidence that may be necessary or proper for the determination and decision of any question, or the discharge of any duty required by law of the board, and may punish disobedience to its subpœna as a contempt (*ib.*, s. 5 as amd. Act 1901, c. 926, s. 2).

REFUSAL—REVOCATION.—The board[3] may, after due notice

that the State board erred in refusing a certificate to a graduate of Laval University, who presented no such license from the College of Physicians and Surgeons; that their act in issuing certificates to those who presented such licenses was an indorsement by the State board of health of Laval University as a reputable and legally chartered medical college. Boucher *v.* State Board of Health, 19 R. I., 366.

[1] OSTEOPATHY.—In an appendix to the laws of Rhode Island, May, 1900, p. 133, will be found a certificate of the Secretary of State of the issuance by him of a certificate of incorporation of the *Rhode Island College of Osteopathy* to give instruction in the principles and practice of osteopathy and branches pertaining to the healing art, with power to grant and issue diplomas conferring such honors and degrees as may be justified by its curriculum, and such as are granted by other reputable colleges teaching the healing art, together with such other privileges and powers as are usually granted to and exercised by similar scientific institutions of learning *in accordance with law*.

[2] A practising physician, making a specialty of the treatment of catarrh, having an office and residing in Boston, and having no office in Rhode Island, except at hotels which he visits periodically, and who notifies his patients of such visits by advertisement, is an itinerant physician within the meaning of sec. 4. Evans *v.* State Board of Health, 19 R. I., 312.

[3] In State Board of Health *v.* Roy, 22 R. I., 538, the court found it unnecessary to determine whether the board is a judicial body, holding that it did not follow, if the board was not a judicial body, that this act (s. 5) was unconstitutional.

The act (sec. 5) does not conflict with sec. 10, art. i. of the State Const. (one shall not be deprived of life, liberty, or property unless by

and hearing, in its discretion refuse to grant the certificate provided for in sec. 3 to any physician who is not of good moral character, or who has violated any of the laws of the State, or who has been guilty of grossly unprofessional conduct, or conduct of a character likely to deceive or defraud the public,[1] and it may after due notice and hearing revoke any certificate granted by it heretofore for like cause or for any fraud or deception committed in obtaining such certificate, or for any other cause which in the opinion of said board[2] shall render the holder an unfit person to practise medicine in this State (*ib.*, s. 5, as amd. Act 1901, c. 926, s. 2).

The board shall serve a copy of its decision or ruling upon any person whose certificate has been refused or revoked. Any person aggrieved by any decision or ruling of the board may within ten days after receiving said notice exclusive of Sundays and legal holidays, take an appeal[3] to the appellate division of the Supreme Court sitting at Providence, and shall file therein his reasons of appeal, and serve a copy thereof on the secretary, or person performing the duties of secretary of said board;[4] and said appellate division shall, as soon as may be, hear and determine said appeal[5] (*ib.*, s. 5, as amd. 1901, c. 926, s. 2).

the judgment of his peers or the law of the land), nor with sec. 1, art. xiv. of amendments to U. S. Const. State Board of Health *v.* Roy, 22 R. I., 538.

[1] A person who presents to the board a diploma issued to another is guilty of conduct likely to deceive and defraud the public, and such conduct is grossly unprofessional. It is immaterial whether the conduct should under the law follow the granting of the certificate, for every subsequent act of practice is a continuation of the fraud and deception. State Board of Health *v.* Roy, 22 R. I., 538.

[2] See, as to the constitutionality of such a provision, n. 1, p. 279.

[3] If the board does not find the charges true, their action in ordering a revocation is ground for appeal, but not of a motion to quash their proceedings. State Board of Health *v.* Roy, 22 R. I., 538.

The appeal vacates the proceedings before the board as far as results go, and brings the matter up before the Appellate Division, *de novo*, for trial as fully as though it had never been heard before the board, save that the original charge or petition remains as the cause of trial, and save also that before it can be so tried before the Appellate Division it must have been brought before the board. State Board of Health *v.* Roy, 22 R. I., 538.

The act is not unconstitutional even if the board is a purely administrative body, because it provides for a trial *de novo* in the Appellate Division. State Board of Health *v.* Roy, 22 R. I., 538.

[4] An *answer* to the appeal is not required. State Board of Health *v.* Roy, 22 R. I., 538.

[5] The act (sec. 5) does not violate s. 1, art. x., R. I. Const., vesting the judicial power in the courts. State Board of Health *v.* Roy, 22 R. I., 538.

The *law of the land* does not require a jury trial in this case. State Board of Health *v.* Roy, 22 R. I., 538.

OFFENCE.—Any person who shall wilfully swear falsely in any proceeding, matter, or hearing before the board is guilty of perjury (*ib.*, s. 5, as amd. Act 1901, c. 926, s. 2).

EXCEPTIONS.[1]—This chapter does not discriminate against any particular school or system of medicine,[2] nor prohibit gratuitous services in case of emergency, nor apply to commissioned surgeons of the United States army, navy, or marine hospital service, nor to legally qualified physicians of another State, called to see a particular case in consultation with a registered physician of this State, but who do not open an office or appoint a place in the State where they may meet patients or receive calls (*ib.*, s. 6, as amd. c. 926, Act. 1901, s. 3).[3]

PROSECUTIONS.—Complaints for violations of the provisions of this chapter[4] shall be made by the secretary of said board, and he shall be exempt from giving surety for costs in any com-

[1] The exceptions are matters of defense only, and need not be negatived in the indictment, nor proved not to exist by the prosecution. State *v.* Flanagan, 55 Atl. R., 876.

[2] The words of sec. 6 against discrimination must be taken in their ordinary sense and meaning. Among medical men there are defined differences regarding the treatment of disease, which differences have resulted in different schools or systems of medicine. A recognition of these differences does not broaden the meaning of the words "practice of medicine" to include the practice of that which is not, in the popular sense, the practice of medicine. State *v.* Mylod, 20 R. I., 632.

If the practice of Christian Science is the practice of medicine, Christian Science is a school or system of medicine, and is entitled to recognition by the State board of health to the same extent as other schools or systems of medicine. It cannot be discriminated against, and its members are entitled to practise medicine provided they possess the statutory qualifications. State *v.* Mylod, 20 R. I., 632.

The statute does not confer arbitrary power on the board. It cannot determine which school is right. It can only determine whether the applicant possesses the statutory qualification to practise in accordance with the recognized theories of a particular school or system. State *v.* Mylod, 20 R. I., 632.

It would be absurd to hold that under c. 165, which provides against discrimination, the requirements necessary to entitle an applicant to a certificate were such that the members of a particular school or system could not comply with them, thus adopting a construction which would operate not as a discrimination only but as a prohibition. State *v.* Mylod, 20 R. I., 632.

On the other hand, to hold that a person who does not know or pretend to know anything about disease, or the method of ascertaining its presence or nature, or about the nature, preparation, or use of drugs or remedies, and who never administers them, may obtain a certificate to practise medicine, is to hold that the operation of the statute is to defeat the beneficial purposes for which it was enacted. State *v.* Mylod, 20 R. I., 632.

[3] Physicians and surgeons are excepted from the restrictions imposed on other persons regarding the practice of dentistry by Gen. Laws, R. I., c. 155, and its amendments. State *v.* Beck, 21 R. I., 288.

[4] The provision that the secretary shall make complaints has no relation to indictments. It is no ground for

plaint made as aforesaid (*ib.*, s. 7, as amd. c. 310, Laws 1896).[1] The secretary shall not be permitted to vote on any question in which he is personally interested (Gen. Laws, c. 96, s. 5).[1]

OFFENCE—PENALTY.—Any person who, not being then lawfully authorized to practise medicine within this State, and so registered according to law, shall practise medicine[2] or surgery[3] or attempt to practise any of the branches[4] of medicine or surgery after having received therefor, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation, or who shall open an office with intent to practise medicine, or shall hold himself out to the public as a practitioner of medicine, whether by appending to his name the title of doctor[5] or any abbreviation thereof, or M.D., or any other title or designation implying a practitioner of medicine, or in any other way, shall be deemed guilty of a misdemeanor[6] and shall be fined on conviction $50, and on each and every subsequent conviction $100, and imprisoned thirty days, or either or both, in the discretion of the court, and in no case where any provision of

demurrer to an indictment that it does not show that the secretary made complaint. State *v.* Flanagan, 55 Atl. R., 876 (1903).

[1] The State board is not both court and prosecutor. It is axiomatic that one cannot judge his own case. If the secretary is personally interested in a complaint, he cannot vote on it. If he is merely officially interested (if there is any distinction), the fact that he initiates the proceedings is no reason for quashing them. State Board of Health *v.* Roy, 22 R. I., 538.

[2] See n. 3, p. 465.

[3] Practice of medicine as used in this act is construed to relate to the practice of medicine as ordinarily and popularly understood, and not to the practice of Christian Science (as testified to in this case). State *v.* Mylod, 20 R. I., 632; 40 Atl. R., 753; 41 L. R. A., 428; see People *v.* Gordon, 194 Ill., 569, *supra*, p. 238, n. 1; p. 240, n. 2.

In State *v.* Anthony, 20 R. I., 644, it was held that a *Christian Scientist* was not engaged in the *practice of medicine.*

[4] The dentist's sphere of operations is included in the larger one of physician and surgeon. State *v.* Beck, 21 R. I., 288. See this case for collection of the statutes regulating dentistry in various other States, which expressly except physicians and surgeons from their operation.

The statutory reference to the practice of medicine *in any of its branches* does not affect the meaning of the words *practice of medicine.* State *v.* Mylod, 20 R. I., 632.

Mere words of encouragement, prayer for divine assistance, or the teaching of Christian Science (as testified in this case), does not constitute the practice of medicine in either of its branches, in the statutory or popular sense. State *v.* Mylod, 20 R. I., 632.

In State *v.* Taft, 20 R. I., 645, it was held that a *metaphysical healer* was not engaged in the *practice of medicine.*

[5] The assumption of the title "doctor" is not unlawful, and its use is immaterial in any case unless under such conditions or circumstances or in such connection that it may serve as an announcement or indication of a readiness to engage in the practice of medicine or surgery. State *v.* Mylod, 20 R. I., 632.

[6] It is not necessary in an indict-

this chapter has been violated shall the person be entitled to receive compensation for services rendered (Gen. Laws, c. 165, s. 8, as amd. c. 926, Act 1901, s. 3 [1]).

Fees.—To clerk from each registered physician, 50 cents (*ib.*, s. 1).

To the board, for each examination, $10 (*ib.*, s. 3, as amd. c. 926, Act 1901).

South Carolina.[2]

See Appendix, p. 700.

Prohibition.—No person shall practise medicine or surgery in the State unless he or she is twenty-one years of age, and either has been heretofore (February 27th, 1904) authorized so to do, pursuant to the laws in force at the time of his or her authorization, or is hereafter (February 27th, 1904) authorized to do so by subsequent subdivisions of this act (Act 1904, c. 292, s. 1).

Definition—Exceptions.—Any person is regarded as practising medicine, within the meaning of this act, who shall treat, operate on, or prescribe for any physical ailment of another, except those engaged solely in the practice of osteopathy. But nothing in this act shall be construed to prohibit service in cases of emergency or the domestic administration of family remedies (*ib.*, s. 2).

State Board of Medical Examiners is composed of eight

ment to use the exact words of the statute, nor to refer to the particular section on which the indictment is based, if it adequately charges the offence set forth in the statute. State *v.* Flanagan, 55 Atl. R., 876. See n. 1, p. 468.

[1] The meaning of the former provision (stricken out of sec. 8 by the amendment of 1901) "to open an office for such purpose or to announce to the public in any other way a readiness to practise medicine or surgery in the State" shall be to engage in the practice of medicine, is discussed in State *v.* Mylod, 20 R. I., 632.

[2] In 1817 the power of granting licenses to physicians was granted to the Medical Society of South Carolina. See State *v.* Heyward, 3 Rich. Law (1832), 389.

The acts on the subject in South Carolina prior to 1888 were 1817, 64; 1828, 367; 1833, 497; 1869, 197; Gen. Stats. 1872, p. 227; 1881, 571; Gen. Stats. 1882, s. 919; 1887, 820. They are discussed at length and reviewed in State *ex rel.* Robbs *v.* Talley, 28 S. C., 589 (1888). The subsequent statutes were 1890, 699; 1893, 498; 1896, 68; 1898, 794; Rev. Stats. S. C., 1893, s. 970; 1900, 421; 1901, 733; Cr. Code, 1902, s. 300; Civ. Code 1902, s. 1,112, and the present Act of 1904, c. 292.

The history of the method of admission to practice from 1817 to 1887 is stated in detail in State *ex rel.* Robbs *v.* Talley, 28 S. C., 589.

In Moore *v.* Napier, 64 S. C., 564, the Supreme Court declined to consider whether the Act of 1901 was constitutional, on the ground that as the petitioner was seeking its benefits, he could not deny its constitutionality.

reputable physicians or surgeons, one from each congressional district, and one from the State at large, nominated by the State Medical Association and appointed and commissioned by the governor; but the governor may reject any or all members nominated, upon satisfactory showing as to the unfitness of those rejected (Act 1904, No. 292, s. 3).

STATE BOARD OF HOMŒOPATHIC MEDICAL EXAMINERS.—The governor is required to appoint three competent homœopathic physicians from the State at large, who shall constitute this board, who shall have the same powers and modes of procedure as the State board (*ib.*, s. 3).

PROHIBITION.—No applicant who has failed, or who may fail in his examination by the State board of medical examiners shall be allowed to present himself or herself before the State board of homœopathic examiners for examination. No graduate of any medical college requiring less than a four-years' course of study will be eligible before the last-named board (*ib.*, s. 3).

MEETINGS OF THE STATE BOARD OF MEDICAL EXAMINERS are held at Columbia, on the second Tuesday in June each year, and continue in session until all applicants are duly examined, and extra meetings may be called by the board when necessary (*ib.*, s. 4, as amd. 1905, c. 465). A majority of the board constitute a quorum. The board has power to make all necessary by-laws and rules for their government (*ib.*).

EXAMINATION—CERTIFICATE.—The board is to examine all candidates for examination, and to pass on their qualification and fitness to practise medicine in this State, and to give to each successful applicant a certificate[1] to that effect,[2] on the payment of $10 to the treasurer of the board (*ib.*, s. 5, as amd. 1905, c. 465).

REGISTRATION OF CERTIFICATE.—Such certificate of qualification shall entitle the holder or holders respectively to be registered as a lawful practising physician by the clerk of the court of the county in which he or she or they may reside, on payment to said clerk of 25 cents for each registration (*ib.*, s. 5).

[1] See n. 2, p. 470.

[2] A practising physician, living in the country, who, when he prescribes whiskey for his patients, furnishes the liquor himself, charging the usual price, is liable to pay the special internal revenue tax provided by United States law [U. S. R. S., 3,242]; no physician who has not paid the tax can keep on hand a supply of spirituous liquor and sell it to his patients, even upon his own prescription. U. S. *v.* Smith, 45 Fed. Rep. 115 (U. S. D. C. W. D. S. C., 1891, Simonton, J.).

No physician will be considered as a legally qualified practitioner until he shall have obtained said registry (*ib.*).

Temporary License.—In the interim between the meetings of the board, its president and secretary may grant temporary license to practise medicine until the next regular meeting of the board to such persons as would under the above sections be eligible for examination. Said temporary license shall not entitle the holder to registry with the clerk of the court of the county in which he resides; but at the next regular meeting of the board the applicant must come up for the regular examination for permanent license (*ib.*, s. 5).

Attendance upon Medical Lectures.—All persons who hold diplomas[1] from any medical college or schools of established reputation, given prior to the passage of this act (February 27th, 1904), and who present certificates of their good moral character, and of their sobriety, from some reputable person or persons known to the board, and who give evidence of sufficient preliminary education (equivalent to the possession of a teacher's first-grade certificate), shall be eligible for examination before the board irrespective of their time of attendance upon medical lectures; but no person who shall graduate after the passage of this act (February 27th, 1904) shall be eligible to appear before the board for examination unless he or she shall give evidence, in addition to sufficient preliminary education, that he or she has attended four full courses of lectures of at least twenty-six weeks each, no two courses being in the same year, and has received a diploma of M.D. therefrom[2] (*ib.*, s. 6). (See Appendix, p. 700.)

[1] Evidence—An act of 1845, 346, authorized practitioners of medicine, graduates, and recipients of a diploma from any regularly organized medical college in the United States to charge, sue for, and collect for their services, in the same manner as graduates of the Medical College of South Carolina, *held* that a diploma did not prove itself, that it must be proved by evidence of the genuineness of the seal, given by a witness acquainted with the impression. It was said, in answer to the argument of inconvenience, that it could not control any established conservative legal policy, and that the inconvenience might be avoided by procuring a license to practise medicine from an existing authority in the State, and that this was not supposed to be difficult for those who could show meritorious claims. (The applicant claimed to be a graduate of a homœopathic medical college in Pennsylvania). Barton *v.* Wilson, 9 Rich. Law (1856), 273.

In the exercise of its discretion the court will not grant a mandamus to compel an act which is contrary to the intent of the legislature, though not contrary to its express language. Moore *v.* Napier, 64 S. C., 564.

[2] The amendment of 1901, 733, subd. 7, which excepted from the provisions requiring an examination,

CURRICULUM.—The curriculum of the State Board of Medical Examiners shall be divided into two sections, the first comprising the junior or primary branches of medical education, designated as the *junior curriculum;* the second comprising the senior and clinical portion of medical education, hereafter to be designated as the *senior curriculum.* The junior curriculum comprises general anatomy, physiology, and histology, materia medica and medical botany, chemistry, organic and inorganic, and medical physics, bacteriology, and pathology. The senior curriculum comprises anatomy, regional and surgical, practical hygiene and sanitary science, State medicine, practical urinalysis, urinary microscopy, therapeutics and toxicology, surgery, general and special, surgical procedure, practical medicine and diseases of children, practical obstetrics and gynæcology, medical jurisprudence (*ib.*, s. 6).

EXAMINATIONS.—Said examinations shall be conducted either in writing or orally, or both, at the discretion of the board (*ib.*).

All applicants before the board, holding a diploma from a four-year graded medical college of established reputation, whether in or out of the State, who have pursued a study of four separate courses, and have attained a mark of not less than seventy-five per cent on each individual branch of their curriculum, as evidenced by certificate from the dean of their college, shall be exempted from examination in the junior curriculum and shall be examined only on those subjects contained in the senior curriculum as heretofore outlined (*ib.*, s. 8). Those applicants who hold diplomas issued by chartered medical colleges, but whose term of attendance has been less than four years, as above stated, must pass upon both the junior and senior curriculum, as must also those attending a four-years' course who cannot produce a certificate showing that they have attained a mark of seventy-five per cent on all the branches of their college curriculum (*ib.*).

LICENSEES OF OTHER STATES.[1]—The board may without

regular graduates holding diplomas issued by a college of established reputation in the State which had a four-year course of instruction, intended to apply the exception to regular graduates who had taken the four-year course, and not to a graduate who, having entered prior to the institution of the four-year course, was graduated in three years. Moore *v.* Napier, 64 S.C., 564 (1902).

[1] In 1888 (under law of 1887, 820) the State board of medical examiners had no jurisdiction for *examination* over any class of applicants except those *coming into the State,* and that

examination indorse, upon receipt of $5, the licenses issued by other State boards having an equal standard, provided such other State boards accord to the licenses of the South Carolina State board the same courtesy. Said other State board licenses, when indorsed, entitle the holder to registry in the State and to all the rights and privileges thereby granted (*ib.*, s. 9).

STANDARD.—The standard required by the State board of medical examiners shall be an average of not less than seventy-five per cent on all the branches examined upon, and not less than sixty per cent on any individual branch (*ib.*, s. 10).

REGISTER OF APPLICANTS.—The board shall keep a record of all its proceedings and a record or register of all applicants for license, with his or her age, time spent in study of medicine, name and location of all institutions granting such applicants degrees or certificates of lectures in medicine or surgery (*ib.*, s. 11).

EVIDENCE.—Said books and register shall be *prima facie* evidence of all the matters therein recorded (*ib.*).

CIVIL PENALTY—EXCEPTIONS.—In no case wherein the provisions of this act have been violated shall any person so violating receive a compensation for services rendered (*ib.*, s. 14).

But all persons now (February 27th, 1904) practising in accordance with the law now of force, or who may hereafter practise medicine or surgery as herein provided shall be entitled to charge, sue for, and collect for their services (*ib.*, s. 14).

APPEAL.—On refusal of the board to grant a license, an appeal may be had to the governor, who may order a re-examination to be held in the presence of the dean of the faculty of any

phrase applied only to *non-residents* coming into the State to engage in the practice of physic or surgery, relying on a diploma obtained without the State. State *ex rel.* Robbs *v.* Talley, 28 S. C., 589. As to residents and those living in the State, the general authority to practise came from the possession of a diploma and registry in the clerk's office; and the board (in the opinion of Simpson, C. J.) by implication had the power to license the last two classes, and it was its duty to do so upon the production of a diploma from any school of medicine, either in the United States or any foreign country, the applicant having attended at least two full courses of instruction and having graduated as prescribed in the Act of 1869; but a majority of the court decided that the board had no such implied power, and that therefore a license could not be required in such case, but that the clerk could register the applicant without a license (*ib.*).

A native of the State who always lived here except when absent, pursuing his studies in another State, is not "a person coming into the State." State *ex rel.* Robbs *v.* Talley, 28 S. C., 589.

medical college in the State and a committee of seven practising physicians (*ib.*, s. 15).

Offence—Penalty—Exception.—It shall be unlawful for any person or persons to practise medicine in this State who have failed to comply with the above provisions, and a violation of the provisions of this act is a misdemeanor; for each offence, on conviction by any court of competent jurisdiction, a fine not less than $50 and not exceeding $300, or imprisonment in county jail not less than thirty days and not longer than ninety days, or both fine and imprisonment, at the discretion of the court. One-half of the fine to go to the informant, the other half to the State, provided that dentists and midwives and those engaged solely in the practice of osteopathy shall not be subject to the provisions of this section (*ib.*, s. 13).

Physicians Previously Registered.—Nothing contained in this act shall in any way affect or apply to physicians and surgeons who have already registered in accordance with the law now of force (*ib.*, s. 13), nor shall it apply to commissioned medical officers of the United States army or navy or the United States marine hospital service, nor shall it include physicians or surgeons residing in other States and called in consultation in special cases with physicians or surgeons residing in the State, nor to physicians, graduates of any reputable college who have been (February 27th, 1904) practising medicine for five years (*ib.*).

Osteopathy.—Nothing in this act in any way affects any person having a diploma from any legally chartered and regularly conducted school of osteopathy. Nothing in the act allows osteopaths to prescribe medicines and practise surgery, *provided* said osteopaths submit their diplomas or certificates of graduation from such college to the State Board of Medical Examiners, who shall grant a permit to practise osteopathy without examination upon payment of a fee of $5 to said board (*ib.*, s. 13). (See Appendix, p. 700.)

Fees.—To treasurer of board, for certificate, $10; one-half is returned if applicant fails to secure a certificate (*ib.*, s. 5, as amd. 1905, c. 465).

To the board for indorsement of license from another State under sec. 9, $5 (*ib.*, s. 9).

To the board for permit to practise osteopathy, $5 (*ib.*, s. 13).

To clerk of court, for registration, 25 cents (*ib.*, s. 5).

South Dakota.

Board of Medical Examiners.—This board is created for the purpose of examination, regulation, licensing, and registration of physicians and surgeons; it consists of seven members, skilled and capable physicians, appointed by the governor (Act 1903, c. 176, ss. 1, 2, as amd. Act 1905, c. 136). The board consists of not more than four members from the school known as regular, not more than two from the school known as homœopath, and not more than one from the school known as eclectic; five members constitute a quorum (*ib.*, s. 3). The board holds two regular meetings each year, beginning on the second Wednesday of July and the second Wednesday of January, and such additional meetings at such times and places as the board may deem advisable. The board has power to make rules and regulations for the government of the board and its officers and for the proper discharge of its duties (*ib.*, s. 5).

No member of the board shall belong to the faculty of any medical college or university, nor be financially interested in the manufacture or sale of drugs or the practice of pharmacy (*ib.*, s. 6).

Record of Board.—The board is required to keep a record of all of its proceedings and a record or register of all applicants for a license, with his or her age, time spent in the study of medicine, and the location and name of all the institutions granting to such applicants degrees or certificates of lectures in medicine or surgery, and whether the applicant was rejected or licensed under this act. Said record or register is *prima facie* evidence of all matters therein recorded (*ib.*, s. 6).

Qualification.—All persons desiring to begin the practice of medicine or surgery or obstetrics in any of their branches, on and after the taking effect of this act (March 5th, 1903), shall make application to said board for a license to practise medicine, surgery, or obstetrics in the State. Such license shall be granted to such applicants *who* shall give satisfactory proofs of being at least twenty-one years of age and of good moral character, but only on compliance with the following conditions: *viz.*, on passing an examination before the board in anatomy, physiology, chemistry, pathology, therapeutics, practice of medicine, surgery, obstetrics, *gyneology* (*sic!*), *disease* of the eye and ear, bacte-

riology, medical jurisprudence, and such other branches as the board may deem advisable; and, in addition, shall present evidence of having attended four full courses of lectures of at least twenty-six weeks each, in a legally organized and reputable medical college, recognized by the board, no two courses being in the same year, and of having received a diploma from a legally organized and reputable medical college, which shall be in good standing, as shall be determined by the board. Said diploma must be submitted to the board for inspection and verification; provided that the four courses of lectures of six months each shall not apply to applicants who graduated prior to 1898 (*ib.*, s. 7). (See Appendix, p. 701.)

EXAMINATION (see QUALIFICATION, above).—The examinations are required to be conducted as follows: The applicant must pay the secretary of the board an examination fee of $20; the examination shall be in writing, oral, or both, as the board may determine; the questions on all subjects, except therapeutics and practice of medicine, shall be such as may be answered alike by all schools of medicine; the applicant shall, if possible, be examined in therapeutics and practice of medicine by those members of the board belonging to the same school as the applicant. The average percentage of at least seventy-five per cent of correct answers shall be required of every applicant. Any applicant who shall not pass the said examination shall be eligible to a second examination at the next regular meeting of the board or at such time as the board may designate, without an additional examination fee (*ib.*, s. 8).

SCHOOL OF MEDICINE.—A license and certificate shall not be refused to any applicant because of his adherence to any particular school of medicine (*ib.*, s. 8).

All examination papers, with the lists of questions answered, shall be kept for reference and inspection, for not less than three years (*ib.*, s. 9).

LICENSE.—Said board shall grant a license to practise medicine, surgery, and obstetrics in all their branches, in the State, to each applicant who has satisfactorily passed the said examination and has fulfilled all other requirements of this act (*ib.*, s. 9). Said license can only be granted by the consent of not less than five members of the said board (*ib.*).

LICENSE WITHOUT EXAMINATION.—The board may in its dis-

cretion accept and license, upon the payment of a license fee, without examination of the applicant, any license which shall have been issued to him by the examining board of the District of Columbia or any State or Territory of the United States, provided that the legal requirements of such examining board shall have been at the time of issuing such certificate or license in no degree or particular less than South Dakota, at the time when such certificate or license shall be presented for registration to the board created by this act; and provided that the provisions of this section shall be held to apply only to such of said medical examining boards as accept and register the certificate or license granted by this board, without examination by them, of the persons holding such certificate or license (*ib.*, s. 10).

Refusal.—The board may refuse to grant a license under this act for unprofessional, immoral, or dishonorable conduct of the applicant. The action of the board in refusing shall be final (*ib.*, s. 11).

Revocation.—The board may revoke any license of any physician or surgeon heretofore (March 5th, 1903) or hereafter granted or issued, upon complaint made to it on oath by one responsible person, if it shall satisfactorily appear to the board either that such physician or surgeon has been guilty of unprofessional, immoral, or dishonorable conduct, or that he has been convicted of a felony, or if he publicly professes or claims to cure or treat disease, injury, or deformity in such a manner as to deceive the public, or gross professional incompetency. But such license shall not be revoked except after a hearing before the board of medical examiners, at which at least five members of said board shall be present, and of which hearing the person holding the license to be revoked shall have had not less than ten days' written notice of the time and place of said hearing, and only upon due proof of the facts stated in the complaint (*ib.*, s. 12).

Definition.—"Unprofessional or dishonorable conduct," as used in secs. 11 and 12, means (1) procuring or aiding or abetting a criminal abortion; (2) employing cappers or steerers; (3) obtaining any fee on the assurance that a manifestly incurable disease can be permanently cured; (4) wilfully betraying a professional secret; (5) all advertising of medical business in which untruthful or improbable statements are made, or which are

calculated to mislead or deceive the public; (6) all advertising of any medicine or any means whereby the monthly periods of women can be regulated or the menses re-established if suppressed; (7) conviction of any offence involving moral turpitude; (8) habitual intemperance (*ib.*, s. 13).

APPEAL.—Persons feeling aggrieved by the action of the board in revoking their license may appeal to the circuit court of the county in which the person whose license is revoked resides, in the same manner as now (March 5th, 1903) provided by law in cases of appeal from the decision of a board of county commissioners, and the perfection of such appeal operates as a stay to the revocation of said license until the final determination thereof by a court; provided that, at any time during the pendency of such appeal, the board may *appeal* to the court for a temporary injunction, restraining the appellant from the practice of medicine, surgery, or obstetrics until the final determination and judgment on such appeal, which injunction may, in the discretion of the court, be issued without the requirement of any board (*ib.*, s. 14).

RECORDING.—The recipient of a license shall have it recorded in the office of the register of deeds in the county where he resides and practises (*ib.*, s. 15).

The registers of deeds are required, in January and July in each year, to furnish to the secretary of the State board of medical examiners a list of all licenses so recorded (*ib.*).

ITINERANT PHYSICIAN.—Any physician practising medicine, surgery, or obstetrics, or professing or attempting to treat, cure, or heal diseases, ailments, or injuries, by any medicine, appliance, or method, who goes from place to place, or from house to house, or by circulars, letters, or advertisements solicits persons to meet him or her for professional treatment at places other than his office at the place of his permanent residence, is an *itinerant physician*, and shall, in addition to the ordinary physician's license as in this act provided, procure an itinerant's license from the State board of medical examiners, for which he shall pay to its secretary $500 per annum; upon the payment of which the board is required to issue to the applicant a license to practise within the State as an itinerant physician for one year from the date thereof. The board may, for the same reasons as specified in sections 11, 12, and 13 (above), refuse to issue such itin-

erant's license, or, having issued it, may revoke it for the same reasons as specified in said sections 11, 12, and 13 (*ib.*, s. 19).

Offence—Penalty.—Practising medicine, surgery, or obstetrics in any of their branches, as an itinerant physician, as in section 19 (above) defined, without having procured such itinerant license, is a misdemeanor,[1] punishable by a fine of from $500 to $800, or imprisonment in the county jail from thirty days to ninety days, or by both such fine and imprisonment (*ib.*, s. 20).

Definition.—When a person shall append or prefix the letters M.B. or M.D., or the title Dr. or Doctor, or any other sign or appellation in a medical sense to his or her name, or shall profess publicly to be a physician or surgeon, or who shall recommend, prescribe, or direct for the use of any person any drug, medicine, apparatus, or other agency for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, bodily injury, or deformity, after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation, he shall be regarded as practising within the meaning of this act (*ib.*, s. 21).

Exceptions.—The act does not apply to commissioned surgeons in the United States army, navy, or marine hospital service in actual performance of their duties; nor to regularly licensed physicians or surgeons, from outside this State, in actual consultation with physicians of this State; nor to dentists, nor osteopaths in the legitimate practice of their profession; nor to Christian Scientists as such, who do not practise medicine, surgery, or obstetrics by the use of any material remedies or agencies; nor to resident physicians and surgeons of this State, regularly licensed and practising in this State at the time of the taking effect of this act (March 5th, 1903), provided, however, that the license heretofore or hereafter granted to any physician or surgeon may be revoked for the same reason and in the same manner as stated and provided in sections 12 and 13 (above) (*ib.*, s. 22).

[1] It is presumed, in a suit for compensation for services, that a physician has complied with law, he need not allege it; if he has not, it is matter of defence. Webster *v.* Lamb, 15 S. D., 292 (citing Lacy *v.* Kossuth Co. (Iowa), 75 N. W. R., 689; Thompson *v.* Sayre, 1 Den. (N. Y.), 175; Lyford *v.* Martin (Minn)., 82 N. W. R., 479.

OFFENCE—PENALTY.—Presenting to the board a false or fraudulent diploma, or one of which the applicant is not the rightful owner, for the purpose of procuring a license, or filing or attempting to file with the register of deeds of any county the license of another, representing it to be his own, or falsely personating any one to whom a license has been granted, or filing or attempting to file with the register of deeds of any county the license of another, with the name of the party to whom it was granted or issued erased, and his own name inserted in its place, or filing or attempting to file with the board any false or forged affidavits of identification, is a misdemeanor, punishable by a fine of from $50 to $100, or imprisonment in the county jail for not more than thirty days, or by both fine and imprisonment (*ib.*, s. 23).

Practising medicine, surgery, or obstetrics in any of their branches in this State, without having obtained a license as in this act provided, and having such license recorded in the office of the register of deeds of the county in which such person resides and practises is a misdemeanor, punishable by a fine of from $50 to $100, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment, provided that the provisions of this section shall not apply to the provisions of sections 19 and 20 (above), nor modify or change the penalties prescribed in section 20 (*ib.*, s. 23, as amd. 1905, c. 136).

PROSECUTION.—The State's attorney must prosecute all violations of this act in his county (*ib.*, s. 24).

FEES.—To the secretary of the board, from an applicant for examination, before being permitted to take the examination, $20 (*ib.*, s. 8). No additional examination fee for second examination at the next regular meeting of the board or at such time as the board may designate (*ib.*).

To the secretary of the board, from applicants under section 10, $20 (*ib.*, s. 10).

To the secretary of the board, for itinerant's license, $500 per annum (*ib.*, s. 19).

OSTEOPATHY — CERTIFICATE — RECORDING. — Any person holding a diploma from a legally incorporated and regularly conducted school of osteopathy of good repute as such, and wherein the course of study comprises a term of twenty months, or four terms of five months each, in actual attendance at such school, and shall include instruction in anatomy, physiology, chemistry,

histology, pathology, gynæcology, obstetrics, and theory and practice of osteopathy, shall, on presentation of such diploma to the State board of health, and satisfying such board that he is the legal holder thereof, be granted by such board a certificate permiting such person to practise osteopathy in South Dakota on payment to said board of $10; which certificate shall be recorded by the register of deeds of the county in which the holder desires to practise (Pol. Code, Rev. Code, S. D. 1903, s. 261).

Osteopathy — Limitations. — The certificate provided in the foregoing section shall not authorize the holder to prescribe or use drugs in his practice nor to perform major or operative surgery (*ib.*, s. 262).

Osteopathy—Offence—Penalty.—Any person who for the purpose of securing such certificate shall falsely represent himself or herself to be the legal holder of any such diploma shall be guilty of a misdemeanor, and shall be punishable by a fine of from $100 to $500 (*ib.*, s. 263).

Osteopathy — Revocation. — Any certificate may be revoked by the State board of health on satisfactory proof of fraudulent representations in procuring the same, or for any violations of the provisions of the certificate, or for any gross immorality by the holder thereof (*ib.*, s. 264).

Osteopathy—Not the Practice of Medicine.—The system, method, or science of treating diseases of the human body commonly known as osteopathy is not the practice of medicine within the meaning of art. 7 of this chapter (*ib.*, s. 265).[1]

Osteopathy — Offence — Penalty. — To practise or attempt to practise osteopathy in treating diseases, or any ailment of the human body without having complied with the provisions of this act is a misdemeanor punishable with a fine of from $100 to $500 or with imprisonment (*ib.*, s. 266, as amd. 1905, c. 143). (See Appendix, p. 700.)

Any person practising osteopathy who violates the provisions of sec. 262 is guilty of a misdemeanor and punishable with a fine of from $100 to $500, and in addition to such fine (*shall*) have his or her certificate as provided for herein revoked (*ib.*, s. 267).

Osteopathy—Fees.—To State board of health, for certificate $10; to register of deeds for recording certificate $1 (*ib.* s. 261).

[1] The Act of 1903, c. 176, seems to have superseded art. 7 of this chapter by repealing all acts and parts of acts in conflict with its provisions (s. 25).

TENNESSEE.

QUALIFICATION.—No person shall practise medicine in any of its departments unless and until he shall have obtained a certificate of license from the State board of medical examiners and shall have it recorded in the county clerk's office in the county or counties in which he proposes to practise; provided that this act shall not apply to any person or persons who at the time of its passage are duly and regularly licensed by law to practise medicine in any of its branches in the State (Act 1901, c. 78, s. 1). (See Appendix, p. 701.)

BOARD OF MEDICAL EXAMINERS.—The governor appoints six graduate physicians of not less than six years' experience in the practice of medicine or surgery, one or both, two residing in each grand division of the State, as a State board of medical examiners; the three schools, allopathic, homœopathic, and eclectic, must be represented on the board, four from the regular school of medicine, one from the eclectic, and one from the homœopathic school of medicine (*ib.*, s. 2). It is the duty of the board to examine into the qualifications of all applicants for certificates of license to practise medicine or surgery (*ib.*, s. 2).

The board is empowered to adopt such by-laws as may be necessary and proper for the efficient operations of the board.

Three members constitute a quorum and a majority of those present are necessary to reject an application, but such rejection shall not bar a re-examination after the lapse of six months (*ib.*, s. 4).

MEETINGS OF THE BOARD.—The regular meeting of the board shall be held once in each year in Nashville, so long as the period of temporary licenses shall continue,[1] and thereafter semi-annually in Nashville, but the president of the board may call special meetings (*ib.*, s. 5).

APPLICATION—EXAMINATION.—Persons desiring to obtain a certificate of license to practise medicine or surgery shall make application therefor in writing to the State board of medical examiners, accompanied by the examination fees and satisfactory proof that the applicant is of good moral character. When

[1] Act 1903, c. 78, struck out from sec. 9 of c. 78, Acts 1901, the proviso that after January 1st, 1903, no certificate of temporary license should issue.

these preliminary requirements are satisfied, the applicant shall present himself before the board for examination in anatomy, physiology, chemistry, pathology, surgery, obstetrics, materia medica, and practice. The member representing each separate school of medicine shall have the right to examine all applicants of that school in the branches peculiar to the teaching of that school, and the board shall accept the grade placed by such member or members upon such special branches (*ib.*, s. 6), provided that graduates of any reputable medical college in the State shall until June 1st, 1902, be granted a certificate of license by the board without reference to the number or length of terms attended, and without the examination above prescribed, but this proviso shall cease and determine after June 1st, 1902 (*ib.*, s. 6).

Examinations.—Two members of the board in each grand division of the State shall, at such time or times as the board may direct, meet at some convenient point in their respective divisions for the purpose of examining applicants for permanent licenses (*ib.*, s. 7); such meetings shall be held at stated periods, and the questions to be propounded upon such examinations shall have been determined upon in advance by the board and shall be identical in each division; and such examinations shall be held on the same day in each division and under uniform rules and regulations to be adopted by the board. The examination papers shall be sealed up and carried to Nashville to the annual meeting of the board, at which time they shall be examined, graded, and passed upon by the board in annual session, and the results declared and certificates issued to those entitled to receive them. The board may, at the option of the members, supplement such written examination by an oral examination, and the recorded value of such oral examination may be given such importance as each member of the board sees fit (*ib.*, s. 7).

Certificate.—If the applicant for examination shall thereupon be found worthy and competent by the board, it shall issue to him a certificate of permanent license, in accordance with the facts in each case, to practise medicine or surgery in the State (*ib.*, s. 8).

Temporary License.—To prevent delay and inconvenience the two members of the board of any grand division may grant a temporary license to any applicant who is permanently located as a resident of some designated place in that division of the

State, upon satisfactory evidence to them that such applicant possesses the qualifications herein above required, and upon examination by them of such applicant in the subjects named in sec. 6 of this act, and make report to the next regular meeting of the board, which shall be in force till the next regular meeting of the board. Such temporary license shall in no case be granted within six months after the applicant has been refused a certificate of license by the board[1] (*ib.*, s. 9, as amd. Act 1903, c. 78).

Record of the Board.—The board is required to keep a record of their proceedings, open for inspection, and shall record the name of each applicant, the time of granting a certificate of license, the names of the members of the board present; and where a certificate of license is denied by the board to any applicant under authority of this act, the fact and ground of such denial shall be entered on the minutes of the board and shall be communicated in writing to such applicant (*ib.*, s. 10).

Recording of Certificate.—Any person receiving a certificate of license, permanent or temporary, must forthwith have it recorded in the office of the county court clerk where he proposes to practise, and the date of record must be indorsed thereon. Such license when so recorded shall not be collaterally questioned in any legal proceeding. Until such license is recorded the holder shall not exercise any of the rights and privileges therein conferred, and in case it is not recorded within three months from the date of its issuance it shall become invalid. A registered physician removing his residence from one county to another county in order to practise medicine shall record his certificate in like manner in the county to which he removes. Practitioners may go from one county to another on professional business, without being required to register, if they have registered in the county in which they reside (*ib.*, s. 12).

County Clerk's Register.—The county clerk shall keep a complete list of certificates recorded by him, with date of each and date of record, and the name of the medical college which conferred the diploma on which the certificate is based and the date when conferred, and shall report every six months, beginning with the first Monday of July, 1901, to the secretary of the board of medical examiners, all such registrations in his office, with a list of deaths and removals from his county. The

[1] See n. 1, p. 483.

register of the county clerk shall be open for inspection during business hours (*ib.*, s. 13).

Revocation.—The board has the right and power to revoke any license upon the ground that it was procured by fraud, or that the *license* (*sic!*) has been guilty of unprofessional or dishonorable conduct (*ib.*, s. 15).

Definition.—Unprofessional or dishonorable conduct as used in sec. 15 mean (1) by procuring or aiding or abetting in procuring a criminal abortion; (2) the obtaining of any fees on the assurance that a manifestly incurable disease can be permanently cured; (3) the wilfully betraying of a professional secret; (4) all advertising *or* (*sic!*) medical business in which untruthful and improbable statements are made; (5) all advertising of medicine or means whereby the monthly periods of women can be regulated or menses reëstablished if suppressed; (6) conviction of any offence involving moral turpitude; (7) habitual intemperance or excessive use of *narcotic* (*sic!*) (*ib.*, s. 16).

Itinerant Physician or Vender—Exceptions.—It is unlawful for any stationed or itinerant physician or person, vender of any drug, nostrum, ointment, or application of any kind intended for the treatment of diseases or injury to sell or apply the same, or by writing, printing, or other methods to profess to cure or treat diseases or deformity by any drug, nostrum, manipulation, or other expedient in the State.

A violation of the provisions of this section is a misdemeanor punishable with a fine of from $100 to $400 (*ib.*, s. 17).

Offence—Penalty.[1]—Any person who shall not at the time of the passage of the act (April 22d, 1901) be duly and regularly licensed by law to practise medicine or surgery in the State, and who shall, notwithstanding, practise medicine or surgery in the State without having first complied with the provisions of this act, shall for each and every instance of such practice be guilty of a misdemeanor and punishable with a fine of from $10 to $25 (*ib.*, s. 18).

To file or attempt to file as his own the diploma or license

[1] Under Act 1889, c. 178 (a predecessor of the present act), one who had not complied with its provisions was not entitled to recover compensation for her services as a physician. Haworth *v.* Montgomery, 91 Tenn. (7 Pickle), 16 (1891).

A contract made in violation of the statute cannot be enforced (*ib.*).

For a case under c. 78, Acts 1901 (a predecessor of the present law), which, however, turned upon the facts, see Payne *v.* State, 79 S. W. R., 1025 (1904).

of another or a forged affidavit of identification is a felony punishable the same as forgery (*ib.*, s. 18).

All fines for offences under this act are paid to the board to constitute a part of its funds (*ib.*, s. 18).

DEFINITION—EXCEPTIONS.—Any person is regarded as practising medicine within the meaning of the act who shall treat, or profess to treat, operate on, or prescribe for any physical ailment or any physical injury to or deformity of another. Nothing in this section applies to the administration of domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry, nor to surgeons of the United States army, navy, or marine hospital service, or to any registered physician or surgeon of other States when called in consultation by a registered physician of this State, or to midwives or to veterinary surgeons, or to osteopathists not giving or using medicine in their practice, or to opticians, or to Christian Scientists (*ib.*, s. 19). (OSTEOPATHY.—See Appendix, p. 701.)

PROSECUTIONS.—The grand jury of each county has inquisitorial power over all offences against or violations of this act, and the circuit and criminal judges shall give the same in their charges to the grand juries (*ib.*, s. 21).

The board shall designate one of its members in each grand division of the State, whose duty it shall be to report any violations of this act to the proper authorities (*ib.*, s. 21).

OFFENCE—PENALTY.—It is a misdemeanor and shall disqualify from office for [the] board of medical examiners to issue a certificate of license to any person only as prescribed or set forth in this act. If the board should be disqualified from office the governor shall appoint a new board (*ib.*, s. 22).

FEES.—To the county court clerk, for recording certificate, 50 cents; for recording the certificate of license of a physician removing from another county, the usual fee for so doing (*ib.*, s. 12).

The board of examiners is empowered to demand for issuing a certificate of permanent license, $5; for the issuance of a certificate of temporary license, $1 (*ib.*).

The board of examiners is empowered to demand for examination for a certificate of permanent license, $10 (*ib.*, s. 11); for a certificate of temporary license, $5 (*ib.*).

OSTEOPATHY.—Any person having a diploma regularly issued by the American School of Osteopathy at Kirksville, Mis-

souri, or any other legally chartered and regularly conducted school of osteopathy, who shall have been in personal attendance as a student in such school for at least four terms of not less than five months each, before graduation, shall be authorized to treat diseases of the human body according to such system, after having filed such diploma for record with the clerk of the county court of the county in which such person resides, and having filed with such clerk an affidavit that the diploma is genuine, and that he or she is the person to whom the same was issued, and that all the provisions of this act were complied with before the issuance of such diploma, whereupon the clerk shall record such diploma and indorse on the diploma the date of filing the same, for which he shall receive from the person $1 (Act 1899, c. 394, s. 1). (See Appendix, p. 701.)

Osteopathy—Offence—Penalty.—Any person who shall practise or pretend or attempt to practise or use the system, method, or science of osteopathy in treating the diseases of the human body without having complied with this act, shall be deemed guilty of a misdemeanor and fined not exceeding $100 for each offence (*ib.*, s. 2). (See Appendix, p. 701.)

Osteopathy—Exception.—Nothing in this act shall be construed as prohibiting any legally authorized practitioner of medicine and surgery of this State from curing and relieving disease with or without drugs or by any manipulation by which any disease may be cured or alleviated (*ib.*). (See Appendix, p. 701.)

Texas.[1]

Constitutional Provision.—The legislature may pass laws prescribing the qualifications of practitioners of medicine,[2] . . .

[1] The laws regulating the practice of dentistry and pharmacy cannot determine the construction of the medical statute; they are not parts of the same act (so held before the passage of the Act of 1901). Peterson *v.* Seagraves, 94 Tex., 390 (1901).

An analysis of the law of May 16th, 1873 (which is stated to have been most crudely and inartificially drawn), will be found in State *v.* Goldman, 44 Tex., 104 (1875).

An analysis of the law as it existed in 1879 will be found in Hilliard *v.* State, 7 Tex. App., 69 (particularly with respect to the persons qualified to practise and the effect of removing from one county to another to practise).

[2] Under the police power the legislature is the proper judge as to what regulations are demanded in dealing with the property and restraining the actions of individuals. Logan *v.* State, 5 Tex. Civ. App., 306.

Without the express constitutional authority the legislature could have passed laws regulating admission to practise medicine. Logan *v.* State, 5 Tex. App., 306.

but no preference shall ever be given by law to any schools of medicine (Const. 1876, art. xvi., s. 31 in part).[1]

Boards of Examiners.[2]—There are three boards of medical examiners: The board of medical examiners for the State of Texas, the board of eclectic medical examiners for the State of Texas, and the board of homœopathic medical examiners for the State of Texas; said boards consist of nine members each. No member shall be a professor or teacher of a medical school (Act 1901, ch. 12, s. 2). Each board is to consist of men learned in medicine and surgery now (1901) in active practice who shall have practised medicine not less than five years prior to their appointment, having complied with the laws relating to the practice of medicine already in force in the State of Texas. They are ap-

[1] The medical law as embodied in title 73, arts. 3,625–3,638 of the Revised Statutes, as they existed in 1894 (now superseded), was constitutional. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461. Appendix, p. 704.

The law (a predecessor of the present law) was passed for the protection of the public against charlatans and quacks. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461.

The law was passed for the public good, both in protecting it from acts of empiricism, and at the same time shielding a noble professiou from unworthy and unskilful members. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461.

The local option law of Texas, title 69 Rev. St., 1895, ss. 3,384, 3,385, Penal Code 1895, arts. 403, 405, which permits a physician to prescribe alcoholic stimulants as medicine in case of actual sickness, *provided* that a physician who does not follow the profession of medicine as his principal and usual calling shall not be authorized to give such prescription, is unconstitutional. The legislature may classify physicians, but reasonably, and upon sound public policy, and for a reason which would attach to the party excluded either moral turpitude or incompetency; but the legislature cannot arbitrarily deprive a citizen of his right to pursue his chosen profession solely because he is engaged in some other lawful business which in no wise attaches to him unfitness to practise his profession, or moral turpitude. Busch *v.* Webb, 122 Fed. R., 655 (U. S. C. C., E. D. Tex.).

On the history of legislation in Texas regulating the practice of medicine, see Logan *v.* State, 5 Tex. Civ. App., 306.

On the constitutionality and date of operation of the Act of 1876, August 21st (now superseded), see Logan *v.* State, 5 Tex. Civ. App., 306.

[2] The Revised Statutes 1897, s. 3,778 (now repealed and superseded by Act 1901), provided for boards of medical examiners composed of physicians graduates of some medical college recognized by the American Medical Association (which was composed exclusively of graduates of the school of allopathy, and did not recognize any other school of medicine), *held* that the constitutional prohibition only restricted the legislature in prescribing the qualifications of practitioners and the punishment for malpractice, and *not* in prescribing the qualifications of members of the board. Dowdell *v.* McBride, 92 Tex., 239.

The case of Dowdell *v.* O'Brien is reported below in 18 Tex. Civ. App., 645.

The court does not take judicial notice that the American Medical Association is composed entirely of adherents to the allopathic school of medicine. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461.

See n. 5, p. 494.

pointed by the governor[1] from a list of names furnished him and recommended by the Texas State Medical Association, the Eclectic Medical Society of the State of Texas, and the Homœopathic Medical Society of the State of Texas. But the governor may, in case he consider any of the persons so recommended unsuitable, decline to appoint any such person or persons, and the society shall then make other recommendations. No one shall be eligible to appointment or service who is addicted to intoxication or the habitual use of morphine, cocaine, or other such drugs (*ib.*, s. 3). (See Appendix, p. 704.)

Six members constitute a quorum (*ib.* s. 4).

The boards are required to meet regularly at least twice a year at such times and places as the boards may from time to time determine; due notice of said meetings shall be given by publication in such papers as may be selected by the boards (*ib.*, s. 4).

The boards may respectively prescribe rules, regulations, and by-laws for their own proceedings and government, and for the examination by their members of applicants for the practice of medicine, surgery, and midwifery (*ib.*, s. 4).

Examination.—The board is required at any of its meetings to examine all persons making application who shall desire to commence the practice of medicine, surgery, midwifery in this State, and who shall not, by the provisions of this act, be exempt from such examination; and when an applicant shall have passed a satisfactory examination, a certificate[2] signed by all the members of the board shall be issued to said applicant, entitling him or her to practise medicine, surgery, obstetrics in the State of Texas, and shall have affixed to it the seal of the State of Texas (*ib.*, s. 5).[3]

[1] Under the Act of August 21st, 1876 (now superseded), district judges were properly empowered to appoint boards of medical examiners. Logan *v.* State, 5 Tex. App., 306.

As to the time when the act of August 21st, 1876, went into effect, see Logan *v.* State, 5 Tex. App., 306.

[2] Under art. 3,786, Sayles, Tex. Civ. Stats., 1897 (now superseded), only one temporary license could be issued. Peterson *v.* Seagraves, 94 Tex., 390 (1901).

Title 82 of the Revised Statues, 1897, gave the board or two members thereof authority to issue a certificate, which, when recorded, should entitle the recipient to practise medicine, and to each member of the board authority to give a temporary certificate entitling the applicant to practise *until* the next meeting of the board. Peterson *v.* Seagraves, 94 Tex., 390.

[3] The law (as it existed in 1899) did not prescribe the form of certificate; the indorsement by a Texas medical board of a certificate issued in another State was a sufficient certificate under the law. Price *v.* State 40 Tex. Cr.

In case any applicant shall fail to pass a satisfactory examination he or she shall not be permitted to stand any further examination within one year thereafter, and in no event shall an applicant who stands rejected by one of said boards be examined or licensed by either of the other boards.

If an applicant desires to practise a system not represented by any of the boards, he or she may elect for himself or herself the board before which he or she will appear for examination; no applicant shall be rejected because of his or her adherence to any particular school of medicine or system of practice, nor on account of his or her views as to the method of treatment and cure of disease. When in the opinion of the presidents of the boards any applicant has been unavoidably prevented from appearing before the board at their regular meeting, said president shall upon notification appoint a committee of three members to examine such applicant, and if the examination be satisfactory notify *he* (*sic!*) secretary, who shall issue to him or her a temporary certificate, which shall have the same force and effect as though granted by the full board, until the applicant shall have the opportunity to appear before the board at its next regular meeting, when said temporary certificate shall become void.

No applicant shall be admitted to examination who cannot submit satisfactory evidence that he or she is more than twenty-one years of age and is of good moral character. Applications for license must be made in writing and presented to the president or secretary of the board before which the applicant desires to appear and must be accompanied by a fee of $15, but when an applicant desires to practise midwifery alone the fee shall be $5 (*ib.*, s. 6).

Record of Boards.—The boards of examiners shall keep a record of their proceedings, showing name, age, place, and duration of residence of each applicant, the time spent in medical study in or out of medical schools, which have granted said applicant any degree or certificate of attendance upon lectures in medicine; said register shall show also whether said applicant was rejected or licensed and shall be *prima facie* evidence of all matters contained therein (*ib.*, s. 7).

App., 428 (1899). The law did not require every member of the board to conduct the examination; if one member examined the applicant and the two (then required by law) indorse his certificate, he could not be punished for practising under such a certificate (*ib.*).

QUALIFICATION—MIDWIFERY.[1]—After the passage of this amendment (passed February 22d, 1901, to take effect[2] ninety days after adjournment—adjourned April 9th, 1901) it shall be unlawful[3] for any person to practise medicine, surgery, or obstetrics, in the State,[4] except (1) all those who were practising medicine in Texas prior to January 1st, 1885; (2) all those who began the practice of medicine in this State after January 1st, 1885,[5] who have complied with the laws of this State regulating the practice of medicine in force prior to the passage of this act, provided that those who had diplomas recorded since January 1st, 1891, shall present to the State boards of medical examiners herein provided, for satisfactory evidence, that their diplomas were issued by *bona fide* medical colleges of respectable standing,[6] receive a certificate from said boards, which shall be recorded[7] as herein provided for, and provided that no fees shall be required for the issuing of such certificates; (3) all persons who shall hereafter receive certificates from the board of medical examiners of this State, as above provided for, and who shall also in other respects have com-

[1] See n. 1, p. 488.

[2] The Act of February 22d, 1901, did not go into effect, under the constitution, until April 9th, 1901. Wickes-Nease *v.* Watts, 30 Tex. Civ. App., 515.

[3] The general test whether unlicensed persons may recover for services rendered turns upon whether the statute or ordinance is prohibitory or for revenue. Wickes-Nease *v.* Watts, 30 Tex. Civ. App., 515 (1902).

However great the hardship following the application of the law to a man who is an honor to and is honored by his profession, the court is without power to relieve him; the law governs courts as well as litigants. Wickes-Nease *v.* Watts, 30 Tex. Civ. App., 515.

[4] Any act which would violate the provisions of the statute could be set out in an information substantially in the language of the act, without noticing the matter contained in the provisos, and the information need not negative by averment the matters contained therein; these are properly matters of defence and provable under the plea of not guilty (citing Blasdell *v.* State, 5 Tex. App., 263; Logan *v.* State, 5 Tex. App., 306; Smith *v.* State, 5 Tex. App., 219). Antle *v.* State, 6 Tex. App., 202.

[5] Ranald *v.* State, 47 S. W. R., 976 (1898), considers the evidence in the particular case to determine whether the accused had practised five consecutive years before 1875.

[6] Where the statute defines an accredited medical college the opinion of physicians on the subject is inadmissible. Aldenhoven *v.* State, 56 S. W. R., 914 (Cr. App., 1900).

The court intimates that whether a college is an *accredited* medical college could not be left by the legislature to depend on the opinion of physicians. Aldenhoven *v.* State, 56 S. W. R., 914 (Cr. App., 1900).

[7] Under the Revised Statutes, 1897, on this subject (now repealed and superseded by the Act of 1901) a physician was not disqualified who had had his diploma, from some accredited medical college, chartered by the legislature of the State or its authority, recorded with the clerk of the district court, although he had not obtained a certificate from a board of examiners entitling him to practise. Wilson *v.* Vick, 93 Tex., 88.

plied with the provisions of this act; (4) provided that all persons who may change their residence to the State of Texas, on filing a true copy of a license granted by the board of medical examiners of another State or Territory, certified by the affidavit of the president and secretary of said board, with satisfactory proof of the genuineness of the same, and showing that the standard of requirements of the medical laws of said State or Territory and that adopted by said board of medical examiners are equal to that provided for by this act, and who on payment of the usual fee of $15 may be registered and receive a license from the board of medical examiners of Texas, to practise in this State; (5) provided further that all persons who desire to hereafter begin the practice of midwifery in this State, and charge for their services, shall make application to the medical examining boards, said application to be accompanied with a fee of $5, and when the said medical examining boards may admit to examination such applicant, and after passing a satisfactory examination in this special branch will be granted a license to practise midwifery in the State of Texas, provided this shall not apply to those who do not follow midwifery as a profession, and who do not advertise themselves as midwives, or hold themselves out to the public as practising the profession of midwifery (*ib.*, s. 8).

DEFINITION.—Any person is regarded as practising medicine or surgery within the meaning of this act who shall profess publicly to be a physician or surgeon and shall offer *for* (*sic!*) practice as such for those needing medical or surgical aid, and shall charge therefor money or other compensation. This act shall be so construed as to include persons not pretending to be physicians who offer for sale publicly on the streets or other public places remedies not manufactured and compounded within this State, which they recommend for the cure of disease (*ib.*, s. 9).

EXCEPTIONS.—This act shall not apply to any commissioned officer or contract surgeon of the United States army, navy, or marine hospital service in the performance of their duties as such, nor to any legally qualified and registered dentist under the laws of this State, nor to any lawfully qualified physician or surgeon residing in other States or Territories, meeting registered physicians and surgeons of the State in consultation (*ib.*, s. 9).

EXAMINATIONS.—The applicant shall be examined in anatomy, physiology, pathology, chemistry, materia medica, thera-

peutics, histology, practice of medicine, surgery, including diseases of the eye, ear, nose and throat, obstetrics, gynecology, hygiene, and medical jurisprudence (*ib.*, s. 10).

Recording.[1]—Before the person obtaining a license can lawfully practise medicine, surgery, or midwifery, he or she must cause[2] it to be recorded in the district clerk's office[3] in the county in which he or she offers to practise[4] (*ib.*, s. 12).

Offence—Penalty.—Any person who shall practise medicine, surgery, or midwifery in violation[5] of the provisions of this act[6] shall be fined from $50 to $500 for such offence or *by*

[1] Where the civil statute (art. 3,635, R. S.) required the certificate to be filed with the clerk of the county court, and the penal statute (Pen. Code, art. 398) required it to be filed with the clerk of the district court, as the conflict could not be reconciled, the court gave the civil statute controlling force (owing to the provisions of art. 6, Pen. Code), and accordingly held that the penal statute (in 1883) defined no offence. French *v.* State, 14 Tex. App., 76.

[2] Where a physician applied to the board, secured a certificate, carried it to the clerk for record, and paid all the fees, and the clerk failed to properly record it, the physician practising thereafter would not have the criminal intent necessary to constitute a misdemeanor. Price *v.* State, 40 Tex. Cr. App., 428.

If the accused labored under the mistake that his certificate had been filed for record, and his mistake did not arise from want of proper care on his part, he was entitled to be acquitted. Pettit *v.* State, 28 Tex. App., 240.

[3] A physician who had complied with the law (art. 3,635, R. S. 1879) in force at the time of the issue of his certificate, by filing it in the office of the county clerk was not entitled to continue to practise after the amendment of March 23d, 1887 (amdg. art. 3,635) without having his certificate recorded in the office of the district clerk, as required by the amending act. Wickes-Nease *v.* Watts, 30 Tex. Civ. App., 515.

[4] Under the Act of 1873, a diploma or a certificate from one board was sufficient to entitle the holder to practise throughout the State, and only one record, in one county, was required. State *v.* Goldman, 44 Tex., 104. See n. 1, p. 488.

An information is sufficient if it alleges that the accused did practise medicine; it is not necessary that it should set out the particular branch; it would be supported by proof of engaging in the practice of medicine in any of its branches or departments, the act being otherwise unlawful (under Act August 21st, 1876). Antle *v.* State, 6 Tex. App., 202.

While the general rule is that the State cannot put in issue the general character of the accused, the rule does not apply when the question is as to the character he assumed, or in which he held himself out to the public. Antle *v.* State, 6 Tex. App., 202.

On form of information for practising dentistry without a license, see Derrick *v.* State, 34 Tex. Cr. App., 21.

[5] Proof of one act in violation of the statute would be sufficient to support a conviction, the proof being in other respects sufficient, as that the accused held himself out to the community in which he lived or sojourned as a physician, and the like. Antle *v.* State, 6 Tex. App., 202.

It is no excuse for the violation of the law that no board of medical examiners has been appointed. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461 (*cf.* n. 2, p. 219). See note 2 *supra*, n. 4, p. 492.

[6] Form of indictment, see State *v.* Goldman, 44 Tex., 104.

Form of indictment under analogous dental statute, see McCann *v.* State, 40 Tex. Cr. App., 111.

Blasdell *v.* State, 5 Tex. Civ. App.,

(*sic!*) both fine and imprisonment not exceeding six months, and it shall not be lawful for him or her to recover by action, suit, motion, or warrant any compensation for services[1] which may be claimed to have been rendered by him or her as such physician, surgeon, or midwife, provided that the provisions of this act do not apply to persons treating disease who do not prescribe or give drugs or medicine (*ib.*, s. 13). (See Appendix, p. 703.)

[PENALTY.[2]—If any person shall practise for pay[3] or as a regular practitioner medicine in any of its branches or departments, or offer or attempt to practise medicine without first having obtained a certificate of professional qualification from some authorized board of medical examiners, or without having a diploma from some accredited medical college chartered by the legislature of the State,[4] or its authority, in which the same is

263, discusses the form of an indictment, and when it is necessary to negative *provisos* in the law; also Logan *v.* State, 5 Tex. Civ. App., 306. Evidence of innocence in accordance with provisos may be proved under a plea of not guilty. Smith *v.* State, 5 Tex. Cr. App., 318.

[1] A contract for services made by a physician while holding the third temporary certificate issued to him by a member of a board was made in violation of law (secs. 438, 440, Penal Code), and cannot be made the foundation of recovery for such services. Peterson *v.* Seagraves, 94 Tex., 390 (1901). See n. 3, p. 492.

A person suing for damages for personal injuries cannot recover as part of his damages the charge for services of a physician who at the time of the rendition of the services was not qualified to practise, and who, therefore, was not entitled to recover for them. San Antonio Street Railway Co. *v.* Muth, 7 Tex. Civ. App., 443.

A physician who has not the certificate of qualification required by law cannot recover for services rendered. Kenedy *v.* Schultz, 25 S. W. R., 667; 6 Tex. Civ. App., 461. San Antonio St. Ry. Co. *v.* Muth, 7 Tex. Civ. App., 443.

In Kenedy *v.* Schultz, 6 Tex. Civ. App., 461, will be found a collation of the cases to the effect that an unlicensed physician cannot recover compensation for his services, viz.: Fox *v.* Dixon, 12 N. Y., 267; Haworth *v.* Montgomery (Tenn.), 18 S. W. R., 399; Gardner *v.* Tatum (Cal.), 22 Pac. R., 880; Roberts *v.* Levy (Cal.), 31 Pac. R., 570; Underwood *v.* Scott (Kan.), 23 Pac. R., 942; Puckett *v.* Alexander (N. C.), 8 S. E. R., 767.

It would be contrary to public policy to enforce the contracts of an unlicensed physician in the courts. Kenedy *v.* Schultz, 6 Tex. Civ. App., 461.

A physician cannot recover for professional services unless he shows compliance with the statute regulating the practice of medicine; in the absence of proof of compliance the physician cannot recover. Wooley *v.* Bell, 76 S. W. R., 797 (1903).

Under the law as it existed in 1900, a regular practising physician, holding a proper diploma duly filed under the law, could recover for his services though he held no certificate from a medical board. Carleton *v.* Sloan, 55 S. W. R., 753, citing Wilson *v.* Vick, 53 S. W. R., 576, 93 Tex., 88.

[2] The matter in brackets was not specifically repealed by Act 1901, c. 12, though it repealed all laws and parts of laws in conflict with it.

[3] See n. 3, p 492.

[4] Under sec. 438, Penal Code, the physician is not required to have a certificate and also a diploma; he may have either. Aldenhoven *v.*

situated, he shall be punished by a fine of not less than $50 nor more than $500 (Wilson's Penal Code, 4th ed., art. 438).[1]

Each patient visited or prescribed for, or each day's offer to practise, constitutes a separate offence (*ib.*, art. 439).

If any person shall engage in the practice of medicine in any of its branches or departments for pay or as a regular practitioner, without having first filed for record,[2] with the clerk of the district court in the county in which he may reside or sojourn, a certificate from some authorized board of medical examiners or a diploma from some accredited medical college, he shall be punished as prescribed in article 438 (*ib.*, art. 440)].[3]

The provisions of the penal code (s.s. Wilson, 438, 439, 440) do not apply to any person who has been regularly engaged in the general practice of medicine in any of its branches or departments in this State for five consecutive years prior to January 1st, 1875, nor to any person who may have legally qualified himself to practise medicine under the provisions of the medical act of May 16th, 1873, nor to any female who may follow the practice of midwifery strictly as such (*ib.*, s. 441).

Fees.—From applicants for license, to accompany the application, $15 (Act 1901, c. 12, s. 6); from applicants desiring to practise midwifery alone, $5 (*ib.*); no fee from applicants in class 2 of sec. 8 (*ib.*, s. 8); from applicants in class 4 of sec. 8, $15 (*ib.*, s. 8); from applicants in class 5 of sec. 8, $5 (*ib.*, s. 8). To the clerk of the district court, for recording certificate, 50 cents (*ib.*, s. 12).

[Tax.—There is levied and collected an annual occupation tax, to be paid annually in advance. From every physician, surgeon, oculist, or medical or other specialist of any kind, travelling from place to place[4] in the practice of his profession, an annual tax of $50 (Sayles, art. 5,049, sub. 13).

State, 56 S. W. R., 914 (Cr. App., 1900).

[1] The Revised Statutes (title 82, art. 3,786, etc.) contained no express prohibition against the practising of medicine by persons without a certificate; the prohibition was contained in Penal Code 438, 440. Peterson *v.* Seagraves, 94 Tex., 390 (1901).

[2] See n. 1, p. 494.

[3] See n. 2, p. 495.

[4] Howe *v.* State, 78 S. W. R., 1,064 (1904), is a case where the question was one of fact, whether the accused was an itinerant physician.

A physician who resides in one town and maintains an office in another is not a specialist travelling from place to place, liable to an occupation tax under Act 1897, p. 51, subd. 13. Broiles *v.* State, 68 S. W. R., 685, citing Hairston *v.* State, 37 S. W. R., 858. See Appendix, p. 704.

A medical specialist having two

From every local practising physician, surgeon, veterinary surgeon, or any medical or surgical specialist, an annual tax of $2 (*ib.*, sub. 14)].[1]

United States.

The regulation of the right to practise medicine and its various branches is regarded as a power of the State governments and not of the national Government.[2] Similarly, in those Territories which have legislatures this subject has been deemed one within the power of the Territorial legislatures. Accordingly Congress has only legislated on this subject for those Territories which have not their own legislatures—Alaska, District of Columbia, and Indian Territory.[3]

The statutes of the United States regulating admission to the medical departments of the army,[4] navy,[5] and marine hospital service[6] are not within the scope of this article. In many of the States the laws except from their operation commissioned mem-

places of business, and dividing his time between the two, and attending professional calls in other counties, is not travelling from place to place in the practice of his profession under R. S. 1895, art. 5,049. Hairston *v.* State, 37 S. W. R., 858 (1896).

If one accused of being a specialist, travelling from place to place without the payment of an annual tax (R. S. 1895, art. 5,049) has not a fixed place of business, it should be shown [*by the prosecution?*]. Hairston *v.* State, 37 S. W. R., 858, Ct. of Cr. App., 1896.

A physician who has two places of business, spending part of his time in each, is not in that a specialist travelling from place to place. Hairston *v.* State, 37 S. W. R., 858, Ct. Cr. App., 1896.

[1] See n. 2, p. 495.

[2] To practise medicine is not one of the *privileges and immunities of citizens* of the United States. It is, however, the right of every citizen of the United States to follow any lawful calling or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. Dent *v.* West Virginia, 129 U. S., 114.

It is a matter within the police power of the respective States. Dent *v.* West Virginia, 129 U. S., 114; Reetz *v.* Michigan, 188 U. S., 505.

The Supreme Court of the United States has had occasion to pass upon the constitutionality of the general features of State laws, and also of certain special features of certain particular State laws in the cases of State *v.* Dent (W. Va.), 129 U. S., 114 (see p. 522, note 1, *infra*); Hawker *v.* New York (N. Y.), 170, U. S., 189 (see p. 390, note 2, *supra*); and Reetz *v.* State (Mich.), 188, U. S., 505 (see p. 306, note 2, *supra*). See also Kansas, p. 271, n. 1, affirmed, under name Meffert *v.* Packer, 195 U. S., p. 625.

See the laws of Arizona, p. 184; New Mexico, p. 383; Oklahoma, p. 435; Hawaii, p. 228; Porto Rico, p. 461.

[3] See Alaska, p. 182; District of Columbia, p. 214; Indian Territory, p. 255.

[4] Act February 2d, 1901, c. 192, s. 18, 31 U. S. Stats., 752; see list of Statutes in note 1 U. S. Comp. Stats., 1901, p. 794.

[5] See Acts collated 1 U. S. Comp. Stats., 1901, p. 988 *et seq.*, and Act March 3d, 1903, c. 1,010, 32 Stats., 1,197.

[6] Act July 1st, 1902, c. 1,370; 32

bers of the United States army, navy, and marine hospital service; certain of the laws adding, in the performance of their official duties, and others omitting this qualifying clause.[1]

Utah.[2]

Board of Examiners.—The governor[3] appoints by and with the advice and consent of the senate a board of seven medical examiners from the various recognized schools of medicine; four members constitute a quorum; appointees are required to be graduates of a legally chartered medical college in good standing (Rev. Stats., 1898, s. 1,728).

Qualification.[4]—The board has power[5] to issue certificates

Stats, 712, Act January 4th, 1889, c. 19, 25 Stats., 639.

[1] See the title Exceptions under the various State and Territorial laws. It is apprehended that State laws could not prescribe the qualifications for admission to the federal medical service, nor regulate the conduct of its members in the discharge of their official duties, so that the express exception, when limited to the performance of their official duties, seems unnecessary, it would be implied, and any express regulation would apparently be invalid as beyond State interference. But the exception of such persons from the State regulations, without limiting the exception to the performance of their official duties, suggests two questions which do not seem to have arisen, viz., (1) whether the exception will be construed to mean only while engaged in their official duties; and, if not, (2) whether the exception of these particular classes from the operation of the State laws, while engaged in the general practice of medicine, is an invalid discrimination for constitutional reasons. See n. 1, p. 368.

[2] Legislation of this general character, to protect the community against the effects of ignorance and incapacity as well as deception and fraud in the practice of medicine, by requiring a certain degree of learning and skill upon the part of the practitioner, ascertained upon an examination by competent persons, or inferred from a certificate in the form of a diploma or license from an institution established for instruction on the subject, is a legitimate exercise of the police power of the State; and depriving persons not so qualified of the right to practise is not obnoxious to the inhibition of the federal Constitution against the deprivation of property without due process of law. People *v.* Hasbrouck, 11 Ut., 291.

The act implies a power to devote the income to the payment of necessary expenses, and therefore it is not true that the statute is unconstitutional because no disposition is directed of the fees. People *v.* Hasbrouck, 11 Ut., 291.

[3] This act took effect June 1st, 1892. The governor had a right to appoint the first board, without the advice and consent of the council, the legislature having then adjourned for the session, under the power to fill vacancies during a recess of the legislature, and his failure to fill the offices within a month did not invalidate the appointments, that provision being merely directory. People *v.* Hasbrouck, 11 Ut., 291.

[4] A uniform rule, and a uniform process for ascertaining and determining qualifications as prescribed by this act, operating equally on all persons, affording to all persons the right to establish their qualifications before the board; this is due process of law. People *v.* Hasbrouck, 11 Ut., 291.

[5] The power conferred on the board is not *judicial* power, as that phrase is used in the organic act in conferring judicial power upon specified

to any person who furnishes satisfactory proof [1] of having received a degree or diploma from a chartered medical college in good standing, and who passes a satisfactory examination before said board [2] (*ib.*, s. 1,729).

CERTIFICATE.—The board shall issue two forms of certificates, one for persons holding such degree or diploma who have been examined and favorably passed on by the board, and another for persons desiring to practise obstetrics under the provisions of section 1,737. Certificates or licenses shall be signed by all members of the board granting them (*ib.*, s. 1,729).

NON-GRADUATES.—No non-graduate licensed under the provisions of the acts of the territorial legislature shall in any way advertise as a doctor, physician, or surgeon, but shall, if he advertises at all, do so as a licensed non-graduate practitioner of medicine (*ib.*, s. 1,731).

REGISTRATION.—The secretary of the board shall enter without fee, upon the register to be kept by him, the names of all persons to whom certificates are issued as physicians and surgeons (*ib.*). (See Appendix, p. 704.)

RECORDING OF CERTIFICATE.—Every person holding a certificate from said board must have it recorded in the office of the recorder of the county in which he resides within three months from its date, and the date of record must be indorsed thereon. Until the certificate is recorded, the holder shall not exercise any of the privileges conferred. A person removing to another county to practise must record his certificate in like manner in the county to which he removes (*ib.*, s. 1,732).

EXAMINATIONS.—Examinations shall be wholly or partly in writing (*ib.*, s. 1,734).

courts; it is not the exercise of a power which appropriately belongs to the judicial power of the Government and does not trench upon the judicial power. People *v.* Hasbrouck, 11 Ut., 291 (citing Williams *v.* State, 113 Ind., 514; State *v.* State Board, 34 Minn., 387).

[1] This act entitles every person whose qualifications to practise medicine, in point of learning and skill or in point of moral character, is in any manner drawn in question, to a hearing before the board. People *v.* Hasbrouck, 11 Ut., 291.

The right of every person whose qualifications, mental or moral, are to be determined, to a hearing before the board, is implied in the provisions for the administration of oaths and taking of testimony in all matters relating to its duties. People *v.* Hasbrouck, 11 Ut., 291.

[2] It would be absurd to contend that the courts must be converted into boards of medical examiners. The question of fitness to practise is properly left to a board composed of experts. People *v.* Hasbrouck, 11 Ut., 291; *cf.*, however, p. 345, n. 2.

REFUSAL—REVOCATION.—The board may refuse [1] to issue certificates to individuals convicted by a court of competent jurisdiction of any offence involving immoral or dishonorable conduct, the nature of which shall be stated in writing, and it may revoke [1] certificates for like causes (*ib.*, s. 1,734).

DEFINITION.—Any person is regarded as practising medicine who treats, operates upon, or prescribes for any physical ailment of another for a fee, or who holds himself out by means of signs, cards, advertisements, or otherwise as a physician or surgeon (*ib.* s. 1,735).

EXCEPTIONS.—The title does not prohibit services in case of emergency or the administration of family remedies, and does not prevent medical officers of the United States army from the discharge of their official duties, nor prohibit visiting physicians in the act of consultation (*ib.*, s. 1,735); nor does it require persons *now* (January 1st, 1898 ?) holding certificates from the territorial board of examiners to make application for license (*ib.*, s. 1,741).

OFFENCE.—Practising medicine, surgery, or obstetrics without a certificate or license or contrary to this title is a misdemeanor (*ib.*, s. 1,736).[2]

OBSTETRICIANS.—Persons desiring to practise obstetrics are entitled to a license upon satisfactorily passing an examination by the State board of examiners and paying to the treasurer thereof $5 (*ib.*, s. 1,737).

EXCEPTION.—Nothing in this *section* prevents physicians holding a certificate from practising obstetrics, or prohibits such service or the acceptance of a fee in case of emergency, or per-

[1] If the board should arbitrarily refuse or revoke a license, the injured party would have his remedy in the courts and the board would be restrained from doing or compelled to undo the wrong; but if the action of the board is in good faith, its final determination is not obnoxious to any constitutional provision. People *v.* Hasbrouck, 11 Ut., 291.

[2] The provisions of the statute are not aimed against citizens of other States, do not abridge their immunities and privileges, nor the privileges or immunities of citizens of the United States; no privileges or immunities are withheld from them which are not withheld from citizens of Utah similarly situated. Citizens of other States are entitled to practise medicine and surgery here on precisely the same terms, and subject only to the same restrictions as our own citizens. People *v.* Hasbrouck, 11 Ut., 291.

If one of the qualifications were such that none but citizens of Utah could possess it, this would not be a denial of equal privileges and immunities to citizens of other States. People *v.* Hasbrouck, 11 Ut., 291 (citing *ex parte* Spinney, 10 Nev., 333, Harding *v.* People, 10 Colo., 387).

sons practising obstetrics in communities where there are no licensed practitioners (*ib.*).

BOARD MEETINGS.—The board is required to meet at the State capital on the first Monday of January, April, July, and October of each year at 10 A.M., and such other times as the president of the board shall deem necessary (*ib.*, s. 1,738).

MEDICAL COLLEGE.—The term "medical college" includes colleges in good standing in the States where they exist (*ib.*, s. 1,740).

FEES.[1]—To the treasurer of the board of examiners, for examination, $15 (*ib.*, s. 1,730).

The secretary of the board is required to enter without fee, on the register to be kept by him, the names of all persons to whom certificates are issued as physicians and surgeons (*ib.*, s. 1,731).

To the county recorder, for recording, his usual fees (*ib.*, s. 1,732).

To the treasurer of the board of examiners, upon examination for license to practise obstetrics, $5 (*ib.*, s. 1,737).

VERMONT.

BOARD OF MEDICAL REGISTRATION.—This board consists of seven members, appointed by the governor, three of the regular school of practice, two of the homœopathic school, and two of the eclectic school, each a graduate of a legally chartered medical college or university having the power to confer the degree of doctor of medicine and surgery (Act 1904, No. 133, s. 1).[2]

The governor is required biennially to appoint members of the board to fill vacancies therein, each appointee being of the same school of practice as his predecessor, so as to keep the same proportion of regular, homœopathic, and eclectic physicians; to be graduates of a legally chartered medical college, and in active practice of their profession. No member shall belong to the faculty of any medical college or university. Such appointments

[1] The fees are legitimate and proper license fees, manifestly intended to meet the cost of executing the law. People *v.* Hasbrouck, 11 Ut., 291.

[2] The act required (s. 1) preference to be given in said appointments to the *present* members of the board of censors of the Vermont medical society, Vermont homœopathic medical society, and the Vermont eclectic medical society.

to be made from lists containing at least double the number of appointees to be made therefrom, furnished by the Vermont Medical Society, the Vermont Homœopathic Medical Society, and the Vermont Eclectic Medical Society respectively, and made at their annual meetings during the year of the biennial session of the legislature; or in the absence of such nominations by such societies the governor is to make his own selection, always preserving the same proportion between the said three schools of practice. Other vacancies are filled by the governor from members of the same school of practice as their predecessors. Members may be removed by the governor for cause (*ib.*, s. 3).

The board is required to meet at the State house in Montpelier on the second Tuesday in January, and at Burlington on the second Tuesday in July annually, and at such other times and places as they may determine for the purpose of examining applicants for a license to practise medicine and surgery in the State.

The board may make such rules and regulations not repugnant to the laws of the State as may be necessary for the government of the board. A majority constitutes a quorum (*ib.*, s. 3).

LICENSE.—The members of the board are empowered to issue such license to persons found qualified (*ib.*).

RECORD.—The secretary of the board is required to keep a record of the name, residence, college, and date of graduation of all persons licensed under the act (*ib.*, s. 5).

QUALIFICATION.—Any person twenty-one years of age, and of good moral character, who is a graduate of a legally chartered medical college or university,[1] having power to confer *degree* (*sic!*) in medicine and surgery, and said medical college or university being recognized as determined by the board, shall on payment of $15 be entitled to examination, and if found qualified shall be licensed to practise medicine and surgery, and receive a license certificate (*ib.*, s. 7).

Any person refused a license may be reëxamined at any regular meeting of the board within one year of the time of such refusal without additional fee (*ib.*, s. 7).

[1] The board of medical censors had the power to determine in the first instance whether a diploma presented to them was genuine or spurious, and where it was issued by a college which had not the legal power to grant the degree of M.D., they might refuse to license the holder. Townshend *v.* Gray, 62 Vt., 373.

REVOCATION.—The board after hearing may revoke the certificate of any person licensed by them who has been convicted before a court of a crime committed in the course of professional business (*ib.*, s. 7).[1]

EXAMINATION.—The examination shall be wholly or in part in writing and of a practical character sufficiently strict to test the qualifications of the applicant as a practitioner of medicine. The examinations shall embrace the general subjects of anatomy, physiology, chemistry, pathology, practice of medicine, surgery, obstetrics, gynecology, hygiene, and materia medica. The examination in materia medica is to be conducted by the members of the board who represent the same school of practice of which the applicant is graduate. Each applicant shall pass at least an average of seventy-five per cent to entitle him to a license (*ib.*, s. 8).

RECORDING.—The license certificate must be recorded by the recipient within thirty days from its date in the office of the Secretary of State (*ib.*, s. 9).[2]

OFFENCE—PENALTY.—Any person who shall practise medicine or surgery under a fictitious or assumed name, or who shall personate another practitioner of a like or different name, or who, not being licensed as aforesaid, shall advertise or hold himself out to the public as a physician or surgeon in this State, or sign a certificate of death, for burial, or removal, is punishable with a fine of from $50 to $200, or by imprisonment in the house of correction not more than three months, or both. And no action of any kind shall be had or maintained by any such person in any court in this State for the recovery of any compensation for such services (*ib.*, s. 10).

DEFINITION.—Any person who shall advertise or hold him-

[1] Where the board of medical censors notified a person licensed as a physician to appear and show cause why his license should not be revoked, as having been obtained upon a bogus diploma; and he failed to appear, and the board at the hearing, and in his absence, revoked his license, upon an affidavit of the secretary of the college, whose diploma he claimed to hold, of which affidavit he had had no notice, it was held that by failing to appear, he had waived the right to insist on formal and regular proof, and that the Supreme Court, in the exercise of its discretion, would therefore deny a petition for a writ of certiorari to review the action of the board. Stevens *v.* Hill, 74 Vt., 164.

[2] Where a physician was a graduate of a medical college and was practising medicine, with a license to practise, at the time of his treatment of a particular patient, but had not at that time recorded his license in the *Medical Register*, as required by statute (Vt. Stats., 1894, s. 4,636), and was therefore at that time liable to a

self out to the public as a physician or surgeon,[1] or who shall assume the title of doctor in the treatment of disease, or who shall follow the occupation of treating disease by any system or method shall for the purposes of this act be deemed a physician or practitioner of medicine or surgery (*ib.*, s. 11).

Exceptions.—Nothing in this act in any way affects the provisions of No. 110 of Acts 1902,[2] or applies to persons licensed by any other board having legal authority to issue licenses in this State (*ib.*, s. 11).

The act does not apply to persons legally licensed to practise medicine and surgery under the provisions of former acts, nor to persons who resided and practised medicine in the State five years previous to November 28th, 1876, nor to commissioned officers of the United States army, navy, or marine hospital service, nor to the practice of midwifery by women in the town or locality in which they reside, nor to a physician or surgeon who is called from another State or the Dominion of Canada to treat a particular case, and who does not otherwise practise in this State, provided that such non-resident physician is legally licensed where he resides, and provided that the State from which he comes, or the Dominion of Canada grants the same privilege to legally licensed practitioners of the State of Vermont (*ib.*, s. 13).

Nothing in the act prevents any non-resident physician or

fine for so practising (*ib.*, s. 4,638); and subsequently another person publicly accused him of malpractice upon his said patient, resulting in his death; and at the time of the accusation his license had been properly recorded, the accusation, found by the jury to be a charge of general professional ignorance and incompetency as a physician, and general professional misconduct and dishonesty in the means habitually resorted to by him to obtain practice, touched the physician in his profession at the time the words were spoken and therefore made them actionable, as slandering him in his profession. Crane *v.* Darling, 71 Vt. 295 (1899).

[1] The degree of M.D. is something more than a mere honorary title. It is a certificate attesting the fact that the person upon whom it has been conferred has successfully mastered the curriculum of study prescribed by the authorities of an institution created by law, and by law authorized to issue such certificate. (See, however, as to degrees *causa honoris*, New York, p. 401.) Its legal character gives it a moral and material credit in the estimation of the world, and makes it thereby a valuable property right of great pecuniary value. It cannot be granted by an institution incorporated under the general law, and not expressly empowered to grant it. Townshend *v.* Gray, 62 Vt., 373.

[2] Act 1902, No. 110, amended Act 1896, No. 99, and made it lawful for graduates of the American School of Osteopathy at Kirksville, Mo., and the Boston Institute of Osteopathy at Boston, Mass., to practise their art in Vermont. See note 1, p. 506.

surgeon from coming into the State in consultation with a legally qualified practitioner in this State (*ib.*, s. 13).

Investigation—Prosecution.—It is the duty of the board to investigate all complaints of disregard, non-compliance, or violation of the provisions of this act, and to bring all such cases to the notice of the proper prosecuting officer (*ib.*, s. 12).

License Without Examination.—The board shall issue licenses without examination to reputable physicians and surgeons who shall personally appear and present a certified copy of certificate of registration or license which has been issued to said applicant in another State in the Union where the requirements for registration shall be deemed by said board to be equivalent to those of this State, provided such State shall accord a like privilege to holders of a license granted under the laws of this State (*ib.*, s. 14).

[Graduates of Canadian Colleges shall be required to attend at least one course of lectures and pass the final examinations of some legally recognized medical college in the United States before they shall be entitled to practise medicine or surgery (Act 1898, No. 113, s. 1).[1]

The provisions of *this act* shall not apply to physicians legally licensed prior to the passage of this act (November 22d, 1898), or to a physician or surgeon residing in the Dominion of Canada who may be called into this State to see a particular case in consultation with a resident practitioner authorized to practise under the laws of this State (*ib.*, s. 2).[1]

Any person violating the provisions of *this act* shall on conviction be fined $50 and costs for each offence (*ib.*, s. 3)].[1]

Fees.—For examination, to the treasurer of the board (*ib.*, s. 5), $15 (*ib.*, s. 7). Reëxamination within one year of refusal of license without additional fee (*ib.*).

To the board from applicants for a license without examination under s. 14, $10 (*ib.*, s. 14).

To the Secretary of State, for recording license certificate, 25 cents (*ib.*, s. 9).

[Osteopathy.—Graduates and the holders of diplomas from the American School of Osteopathy at Kirksville, Mo., or from

[1] This statute was not specifically repealed by Act 1904, No. 133, although the latter act repealed all inconsistent acts and thereby probably repealed the matter in brackets.

the Boston Institute of Osteopathy at Boston, Mass., may practise their art of healing in the State of Vermont (Act 1896, No. 99, as amd. Act 1902, c. 110)].[1]

Osteopathy — Examining Board.—The governor appoints an examining board of three members (Act 1904, No. 134, s. 1), to be known as the State board of osteopathic examination and registration. No person shall be appointed on the board who is not a graduate of a reputable school of osteopathy and who has not been a resident of Vermont and engaged in the active practice of osteopathy for at least two years immediately preceding his appointment (*ib.*, s. 3).

Osteopathy—Qualification.—The board is required to meet at least semiannually at such time and place as it shall designate to examine applicants to practise osteopathy and to grant licenses to such applicants as shall satisfactorily pass the examination prescribed by the board, providing said applicants are of good moral character, and graduates of some recognized school of osteopathy requiring a three-years' course of nine months each year, and who present evidence satisfactory to the board, of a sufficient preliminary education, and who are at least twenty-one years of age (*ib.*, s. 3).

Examinations.—The board shall prescribe an examination which shall include anatomy, physiology, physiological chemistry, toxicology, pathology, urinalysis, histology, neurology, physical diagnosis, obstetrics, gynecology, minor surgery, hygiene, medical jurisprudence, principles and practice of osteopathy, and such other subjects as the board may direct. In each of the subjects named the applicants shall pass a minimum grade of seventy per cent and a general average for the entire examination of not less than seventy-five per cent (*ib.*, s. 4). Any person failing to pass such examination may at any time within one year present himself for a second examination without payment of any additional fee (*ib.*, s. 5).

Osteopathy—Practice Without Examination.—Any person producing satisfactory evidence of having practised osteopathy in any other State or Territory of the United States for at least five years, who shall personally appear and present

[1] This statute was not specifically repealed by Act 1904, No. 134, although the latter act repealed all inconsistent acts, and thereby probably repealed the matter in brackets; but see note 2, p. 504.

a certified copy of certificate of registration or license issued to him in another State in the Union, where the requirements for registration shall be deemed by said board to be equivalent to those of this State, shall be entitled to practise osteopathy on presenting to the board a diploma granted by a recognized school of osteopathy and the payment of a registration fee of $25 (*ib.*, s. 6).

Osteopathy—Former Practitioners.—Any person engaged in the practice of osteopathy in this State at the time of the passage of this act (December 7th, 1904), and who holds a diploma from a recognized college of osteopathy was entitled to receive a certificate of registration on presenting to the board his diploma on or before March 1st, 1905, and on payment of a registration fee of $5 (*ib.*, s. 7).

Osteopathy—Record.—The certificate of registration must be recorded by the recipient in the office of the clerk of the county in which he resides (*ib.*, 8).

Osteopathy—Laws Applicable to Practitioners.—All statutory regulations controlling contagious diseases and the granting of certificates of births and deaths shall apply to practitioners of osteopathy (*ib.*, s. 11).

Osteopathy—Penalty.—To practise or attempt to practise the science of osteopathy in Vermont without complying with the provisions of this act is a misdemeanor, punishable by a fine of from $50 to $500, or by confinement in the house of correction for not more than one year, or both fine and imprisonment (*ib.*, s. 12).

Osteopathy—Fees.—To the treasurer of the board before examination, $25 (*ib.*, s. 5); no additional fee for reëxamination within one year (*ib.*).

Registration fee under sec. 6, $25 (*ib.*, s. 6). Registration fee from former practitioners registered on or prior to March 1st, 1905, $5 (*ib.*, s. 7). To the county clerk the fee for recording (*ib.*, s. 8).

Virginia.[1]

Board of Examiners.—There is a State board of medical examiners consisting of one member from each congressional

[1] In the Code of 1904, there is a compilation of earlier provisions (Act 1893–94, p. 400, p. 68) (numbered in the Code 1,743, *h*), which the compiler has inserted because they are not expressly repealed by the later law, but

district and three from the State at large, and two homœopathic physicians from the State at large (Code 1904, s. 1,744).

The board is composed of men learned in medicine and surgery appointed by the governor from a list of names recommended by the Medical Society of Virginia, together with two homœopathic physicians nominated to him by the Hahnemann Medical Society of the Old Dominion. The recommendations are required to be by votes of a majority present at some meeting of such society; but if the governor considers any person so recommended unsuitable he may decline to appoint him, in which case such society shall within ninety days after notification make another recommendation, and if the society fail to make a recommendation the governor is required to appoint such board in whole or in part without regard to such recommendation. If any examiner cease to reside in the district for which he was appointed his office is deemed vacant (*ib.*, s. 1,745).

The regular meetings of the board are required to be held at least once a year, and at such times and places as the board may prescribe, and special meetings may be held on the call of the president and any five members. The board may prescribe rules for the examination by its members of candidates for the practice of medicine and surgery (*ib.*, s. 1,746).

Examination.—The board at any of its meetings must examine all persons making application to them who desire to commence the practice of medicine or surgery in the State, provided said applicant shall produce before the board a diploma or other satisfactory evidence of his graduation in some medical college or institution teaching the art of healing human diseases chartered by the State or Territory in which the same is situated; provided that any undergraduate taking a graded course in any regularly chartered medical college shall be entitled to an examination on such branch or branches as he or she may present a certificate from the said college of having passed a satisfactory examination, and having once passed a satisfactory examination on each of such branches before the State board of medical examiners, no further examination shall be required on such branch or branches; but an applicant failing to pass a satisfac-

which he says seem to be largely if not entirely superseded by the later amendments. As they seem to be either embodied in or wholly inconsistent with the later law, we have not abstracted them, but have abstracted only the later laws on the same subject.

tory examination on any of such branches shall not be permitted to be examined on such branch or branches until he or she presents a diploma of graduation as doctor of medicine from some regularly chartered college of medicine (*ib.*, s. 1,747).

And when an applicant shall have passed an examination satisfactory as to proficiency before the board in session, the president must grant a certificate to that effect. Any applicant professing a system of medicine which does not require the use of drugs in the treatment of disease shall be exempt from standing an examination on materia medica (*ib.*, s. 1,747).

Reexamination—Special Permit.—In case any applicant shall fail to pass a satisfactory examination he shall not be permitted to stand any further examination within six months thereafter. Such applicant shall not have again to pay the fee prescribed; provided that no applicant shall be rejected on his examination on account of his adherence to any particular school of medicine or system of practice, nor on account of his views as to the method of treatment and the care of disease, and provided further that when, in the opinion of the president of the board, any applicant has been prevented by good cause from appearing before the board, the president shall have authority, in his discretion, to grant a special permit to such applicant to practise medicine or surgery until he shall have an opportunity to appear before the board in session for examination, which special permit shall be revocable at the discretion of the president. In no case shall the special permit entitle the holder to practise after the next regular meeting of the board. The board has in its discretion authority to accept in lieu of examination a diploma or other satisfactory evidence of graduation in some medical college chartered by the State or Territory in which the same is situated and a certificate from the examining board of any other State or Territory of the United States or of the District of Columbia, showing that the applicant has passed a satisfactory examination as to his proficiency, and obtained license from said board to practise medicine and surgery in said State, Territory, or District; provided that any person examined by the State examining board, prior to January 1st, 1900, whose fee for such examination was duly paid, but who failed to pass said examination, shall have the right and privilege of taking the examination before the

State board, notwithstanding the provisions of this act (*ib.*, s. 1,747).

Record of Certificate.—Before any person who obtains a certificate may lawfully practise medicine or surgery, he must cause it to be recorded in the clerk's office of the county or corporation in which he resides in this State, or, if he resides in the city of Richmond, in the clerk's office of the chancery court of the said city; or if he does not reside in the State, in the clerk's office of the county or corporation in which he offers to practise, or if he offers to practise in the city of Richmond, in the clerk's office of the chancery court of that city (*ib.*, s. 1,749). It shall be indexed in the name of the person to whom it is granted (*ib.*).

Prohibition.—No person who shall have commenced the practice of medicine or surgery in the State since January 1st, 1885, or who shall hereafter commence the practice of the same, shall practise as a physician or surgeon for compensation without having first obtained a certificate from the State board of medical examiners and caused it to be recorded, or a special permit from the president of the board (*ib.*, s. 1,750).

Definition—Exceptions.—To open an office for such purpose (*i.e.*, practice as a physician or surgeon for compensation [?]), or to announce to the public in any way a readiness to practise medicine in any county or city of the State, or to prescribe for or to give surgical assistance to, or to heal, cure, or relieve, or to attempt to heal, cure, or relieve those suffering from injury or deformity or disease of mind or body,[1] or to advertise or to announce to the public in any manner a readiness or ability to heal, cure, or relieve those who may be suffering from injury or deformity or disease of mind or body, shall be to engage in the practice of medicine within the meaning of this section; provided that nothing in this section shall be construed to apply to or to limit in any manner the manufacture or sale of proprietary medicines, or apply to, affect, or interfere in any way with the operation of any hospital *now* [April 24th, 1903] established in this State or any person while engaged in conducting such hospital, if there be a licensed physician resident and practising

[1] On the constitutionality of such sweeping provisions see State *v.* Biggs [N. C.], p. 405, n. 2; *cf.* also the decision of the United States Supreme Court on the unconstitutionality of the N. Y. law, limiting the hours of labor in bakeries to ten hours a day—decided as this goes to press, and not yet officially reported.

therein, or to any person who commenced the practice of osteopathy in the State prior to January 1st, 1903.

It shall also be regarded as practising medicine within the meaning of this section if any one shall use, in connection with his or her name, the words or letters "Dr.," "doctor," "professor," "M.D.," or "healer," or any other title, word, letter, or designation, intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches; but this section shall not be construed to apply to non-itinerant opticians who are at this time [April 24th, 1903] engaged in the practice of optometry in this State, nor to professional or other nurses (*ib.*, s. 1,750).

PENALTY.—Any person who shall practise medicine or surgery [1] in this State in violation of the provisions of this section [2] is punishable with a fine of from $50 to $500 for each offence,[3] and it shall not be lawful for him to recover by action, suit, motion, or warrant in any of the courts of the State any compensation for services claimed to have been rendered as such physician or surgeon (*ib.*, s. 1,750).

JURISDICTION.—The circuit and corporation courts have exclusive jurisdiction to try offences for violation of this section committed within their respective counties and corporation (*ib.*, s. 1,750).

[1] Where the statute (Acts 1883–84, p. 597, s. 2) provided that no person should practise *as a physician* without a license, and the indictment charged that the accused *practised medicine* without a license, the indictment was sufficient and not open to demurrer; to charge a person with practising medicine is equivalent to charging that he practised as a physician. Whitlock *v.* Commonwealth, 89 Va., 337.

[2] Where accused was indicted for practising medicine without a license, it was not error to permit a witness after he had testified that he had procured in Winchester (within the jurisdiction where the case was tried) a prescription for his wife from defendant, to testify that defendant had visited members of his family and practised upon them, outside of Winchester; though the first testimony was evidence of a completed offence, the further testimony was admissible under the general charge of the indictment, of practising medicine without a license, the court stating that the evidence was confined to a period within a year of the finding of the indictment, and the place (a quarter of a mile outside of the corporate limits of the city of Winchester) being within the jurisdiction of the court. Whitlock *v.* Commonwealth, 89 Va., 337.

[3] No prejudicial error was committed in giving the jury an instruction that the law (Code 1887, s. 574), imposing a fine in cases where no other penalty was specifically imposed, applied, whereas the law (1883–84, p. 597, s. 92) specifically imposed a fine for practising as a physician without a license, the minimum penalty under each of said laws being the same, and the jury by their verdict having imposed the minimum fine. Whitlock *v.* Commonwealth, 89 Va., 337.

NON-RESIDENTS.—Any physician or surgeon who resides in an adjoining State within ten miles of the boundary line of this State is entitled to stand the examination and receive a certificate, and the certificate must be recorded as above provided in that county in the State nearest to his place of residence, and such certificate and recordation shall make it lawful for him to practise medicine and surgery in this State (*ib.*, s. 1,751).

EXCEPTIONS.—Nothing in this chapter includes or affects any dentist or midwife, nor any commissioned officer or contract surgeon of the United States army, navy, or marine hospital service in the performance of his duties as such, nor *to* (*sic!*) any physician or surgeon residing in any other State or Territory of the United States or in the District of Columbia called into consultation in a special case with a physician or surgeon residing in this State, nor does this chapter affect or change in any way the laws in reference to the license tax to be paid by physicians, surgeons, and dentists (*ib.*, s. 1,752).

FEES.—To the board of examiners, through such officers or members as it may designate, before examination, $10 (*ib.*, s. 1,747). For reëxamination, no fee (*ib.*)

To the clerk of the court, for recording, same fee as for recording a deed (*ib.*, s. 1,749).

LICENSE TAX.—No person shall, without a license authorized by law, practise as a physician or surgeon or the art of healing bodily or mental infirmities without physic or surgery;[1] and no person who shall hereafter apply for license to practise as a physician or surgeon shall have such license granted to him unless at the time of such application he shall exhibit to the commissioner of the revenue to whom such application is made a certificate from the president of the State board of medical examiners, that such person has passed a satisfactory examination before said board, or a special permit from said president, or shall file with him an affidavit that such applicant for a license to practise medicine or surgery commenced the practice of medicine or surgery in this State prior to January 1st, 1885, which affidavit shall be subscribed and sworn to by such applicant (Tax Bill, April 16th, 1903, cl. 114, Code 1904; Appendix, p. 2,244, cl. 114). A false oath in such affidavit is perjury (*ib.*). Nothing in this section prevents any authorized physician or surgeon or other per-

[1] See n. 1, p. 510.

son from extracting teeth for any one suffering from toothache (*ib.*).

No person shall practise as a physician or *surgeons* (*sic !*) for compensation[1] without a license; but a license to practise either medicine or surgery shall confer the privilege of practising both of said professions; a license granted to practise in any county or corporation authorizes such physician or surgeon to practise throughout the commonwealth. Any person violating any of the provisions of this *section*, or who shall practise in either of the professions named without having first obtained a license therefor, shall pay a fine of from $30 to $100 for each offence, and shall be debarred from recovering any compensation for such services by action, suit, motion, or warrant in any of the courts of the commonwealth (*ib.*, cl. 117, Code 1904; Appendix, p. 2,245, cl. 117).

Every physician or surgeon who has been licensed for less than five years shall pay $10 (for the year commencing February 1st, 1903, and each year thereafter [?])—(*ib.*, cl. 1, Code 1904, Appendix, p. 2,191). And every physician or surgeon who has been licensed and practised for five years and more shall pay $15; but in cities and towns of five thousand inhabitants or more the tax on physicians or surgeons shall be $25, provided that no physician or surgeon shall be required to pay more than $10 whose receipts are less than $500 per annum. Every *physicians* (*sic !*) or surgeon shall be licensed by the commissioner of the revenue for the district or city wherein such physician or surgeon has his regular and principal office (*ib.*, cl. 118, Code 1904; Appendix, p. 2,245, cl. 118).

No person shall sell any medicine, salve, liniment, or compound of a like kind, unless he be a licensed merchant, whether he be the manufacturer thereof or not, without a license.

Any person selling any medicine, salve, liniment, or any compound of a like kind without having first obtained a license for such privilege, shall pay a fine of from $30 to $100

[1] While Act 1884 provided that no person should practise as a physician for compensation, without a license. Code of 1887, s. 534, provided that it should be unlawful for any person to engage without a license in any business or profession for which a license is required, either with or without compensation; therefore it was not essential that an indictment for practising medicine (*i.e.*, as a physician) without a license should allege that the accused practised for compensation. Whitlock *v.* Commonwealth, 89 Va., 337.

for each offence (*ib.*, cl. 119, Code 1904; Appendix, p. 2,245, cl. 119).

MIDWIVES.—The preceding sections of this chapter shall not apply to any midwife (*ib.*, s. 1,753).

GRADUATE NURSES.—The license and practice of the profession of graduate nurse is regulated at length by sec. 1,766, *a*, Code 1904, but the laws regulating that profession do not fall within the scope of this article.

WASHINGTON.[1]

CONSTITUTIONAL PROVISION.—The legislature shall enact laws to regulate the practice of medicine and surgery (Constitution, art. xx., s. 2).

EXAMINING BOARD.—The governor[2] is required to appoint a State medical examining board of nine members, learned and skilled in the practice and theory of medicine and surgery[3] (Act of April 10th, 1890, p. 114, s. 1; Ballinger's Code, s. 3,012).

The said board is required to hold meetings for examination on the first Tuesday of January and July in each year, alter-

[1] The right of the legislature to enact a law of this character is founded upon the police power of the State. This is "that inherent and plenary power in the State which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society" (quoting from Lake View *v.* Rose Hill Cemetery, 70 Ill., 192). In the profession of medicine, so great is the necessity for special qualifications in the practitioner, and so injurious the consequences likely to result from the want of it, that the power of the legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties cannot be doubted (citing Hewitt *v.* Charier, 16 Pick. Mass., 353; Wright *v.* Lanckton, 19 Pick. Mass., 288; Cooley, Const. Lim., p. 745). State *v.* Carey, 4 Wash., 424.

On the constitutionality of analogous laws regulating admission to the practice of dentistry, see *in re* Thompson, 78 Pac. R., 899 (Wash.).

[2] There is no violation of the Constitution of the State of Washington (Art. i., s. 12, prohibiting the passage of laws granting to any citizen or corporation privileges or immunities, which upon the same terms shall not equally belong to all citizens or corporations) in vesting the governor with the power of selecting the board of medical examiners. State *v.* Carey, 4 Wash., 424.

[3] If the act exempted the members of the examining board from any of the burdens imposed on other physicians (*e.g.*, submitting to an examination and paying the examination fee), it might be unconstitutional under Art. i., s. 12, Const. Wash. But the fact that a practitioner of medicine is a member of the board does not release him from obtaining a license and paying the fee. A majority of the board may grant the license, and they may grant it to a member of the board. State *v.* Carey, 4 Wash., 424.

nately in western and eastern Washington, at such places as the board may designate. The board may call special meetings when in the opinion of a majority of the board they are necessary. The board is required to keep a record of all applicants for a license, with his or her age, the time spent in the study and practice of medicine or surgery, and the name and location of all institutions granting to such applicants degrees or certificates of lectures in medicine or surgery, and whether such applicant was rejected or licensed; and said register is *prima facie* evidence of all matters therein recorded (*ib.*, s. 2; Ballinger, s. 3,013).

QUALIFICATION.—Every person desiring to commence[1] the practice of medicine or surgery, or either of them, in any of its or their branches, must make a written application to the board for a license; each applicant for license must be not less than twenty-one years of age, shall furnish a certificate of good moral character, and shall be a graduate of some duly authorized medical college *now* having, if it be in existence, at least a four-years' graded course.[2] At the time and place designated by the board or at a regular meeting of the board, applicants must be examined[3]

[1] It is no valid objection to the law (clxix. of Code of Washington Territory) that it discriminates between persons of equal learning and skill by permitting those to continue to practise who were so engaged on the day before the passage of the law, and denies that privilege to those who seek to so engage on the day following, for in fact the law did not deny the privilege of practising to any one. It allowed any citizen of the Territory to qualify according to its terms, and then to practise. Fox *v.* Territory of Washington, 2 Wash. Ter. R., 297.

[2] The prescription as a standard, of graduation from a medical college or university, and the relaxation of the standard in favor of those who were engaged in practice at the time of the passage of the law, was no deprivation of a right secured by the 14th amendment to the U. S. Constitution; it is not the right of medical practitioners, bearing diplomas, to have excluded from practice all who are not thus qualified. Fox *v.* Territory of Washington, 2 Wash. Ter. R., 297 (1884).

Under the dental law, it was held that the legislature might provide that an applicant must be possessed of a diploma from some dental college in good standing; that such a requirement was not unreasonable nor unconstitutional. *In re* Thompson, 78 Pac. R., 899 (Wash.), citing *ex parte* Whitley (Cal.), 77 Pac. R., 879.

[3] For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons, who have neither learning nor skill. State *v.* Carey, 4 Wash., 424.

It is a crime to agree to obtain for a money consideration from a member of the medical board a set of the examination questions in advance of the examination, in order that another than the intending applicant shall prepare the answers, and that the said applicant shall then appear at the examination and give the answers as his own. It is an agreement to defraud the board, and the crime is complete when the agreement is made, though the intent is not carried out. The crime is not dependent on the success or failure of the enterprise. The gist of the offence is a

in anatomy, physiology, chemistry, histology, materia medica, *therapeutics*, preventive medicines, practice of medicine, surgery, obstetrics, diseases of women and children, of the nervous system, of the eye and ear, medical jurisprudence, and such other branches as the board deem advisable. The examination must be both scientific and practical, and of sufficient severity to test the candidate's fitness to practise medicine and surgery,[1] and shall be by written or printed, or partly written and partly printed, questions and answers, and the same are required to be filed and preserved of record in the office of the secretary of the board. After the examination, if it be satisfactory,[2] the board shall grant a license to practise medicine and surgery, by the consent of not less than five members, except as hereinafter provided (*ib.*, s. 3, as amended Act 1901, c. 42, s. 1, as amended Act 1905, c. 41).

LICENSEE OF BOARD OF ANOTHER STATE.—If an applicant for a license produce and exhibit to an examining board a certificate from a board of medical examiners appointed under the laws of any State of the United States and recognizing licenses from this State, that the person presenting it is duly and well qualified to practise medicine and surgery in the State issuing said certificate, and that the board issuing it has subjected the applicant to a thorough examination to ascertain this fact, he or she may at the discretion of the examining board, on paying the prescribed fee and otherwise complying with all the requirements of this act, receive from the examining board a license as if an examination was had in this State; on filing such license with the clerk of the superior court, as in this act provided, he or she shall be a legally qualified practitioner of medicine and surgery,

fraudulent and corrupt combination with the intent that injury shall result. While it is not unlawful to pass the examination, the means to be used were unlawful, and the agreement constituted an indictable conspiracy. State *v.* Stewart, 72 Pac. R., 1,026 (1903, Supr. Ct. of Wash.).

[1] It is not within the power of the legislature to discriminate in favor of any particular school *or* medicine. When intelligent and educated men differ in their theories, the legislature has no power to condemn the one or approve the other, but it may require learning and skill in the school of medicine which the physician professes to practise (citing Eastman *v* State, 109 Ind., 278, White *v.* Carroll, 42 N. Y., 161). State *v.* Carey, 4 Wash., 424.

[2] The statute (1889–90, p. 114) does not discriminate between rival or different schools of medicine, nor does it invade or abridge any citizen's constitutional right. No one is proscribed or prevented from practising medicine. State *v.* Carey, 4 Wash., 424.

subject to the provisions of the act as to revocation of license (*ib.*, s. 3, as amended Act 1901, c. 42, s. 1; Ballinger, s. 3,014, amended Act 1905, c. 40).

REFUSAL OR REVOCATION.—The board may refuse or revoke a license for unprofessional or dishonorable conduct, subject to the right of appeal (*ib.*, s. 3, as amended Act 1901, c. 42, s. 1 and Act 1905, c. 40).

"Unprofessional or dishonorable conduct" means: procuring or aiding or abetting in procuring a criminal abortion; or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that a manifestly incurable disease can be permanently cured; or wilfully betraying a professional secret; or advertisements of medical business in which untruthful and improbable statements are made; or advertising any medicines or means whereby the monthly periods of women can be regulated, or the menses re-established if suppressed; or the conviction of any offence involving moral turpitude; or habitual intemperance (*ib.*, s. 4; Ballinger, s. 3,015).

In case of a refusal or a revocation of a license, the board is required to file a brief and concise statement of the grounds and reasons thereof in the office of its secretary, which, with the decision of the board in writing, shall remain of record in said office. Before a license can be revoked for unprofessional or dishonorable conduct, a complaint of some person under oath must be filed in the office of the secretary of the board, charging the acts of unprofessional or dishonorable conduct and the facts complained against the accused in ordinary and concise language, and at least ten days prior to the hearing the board shall cause to be served upon the accused a written notice and copy of such complaint, such notice containing a statement of the time and place of the hearing. The accused may appear at the hearing and defend in person or by counsel, and may have the sworn testimony of witnesses taken and present other evidence in his behalf, and the board may receive arguments of counsel (*ib.*, s. 5; Ballinger, s. 3,016).

APPEAL IN CASE OF REVOCATION OR REFUSAL OF LICENSE.[1]—

[1] The law (1889–90, p. 114) excludes no one who is actually qualified and who is willing to submit to the prescribed examination, and to guard against arbitrary or captious action of the board. It provides for an appeal to the courts of justice where a license is refused or revoked. It is not in conflict with any constitutional right. State *v.* Carey, 4 Wash., 424.

In case of refusal or revocation of a license by the board, there is a right of appeal within thirty days after the filing of the decree in the office of the secretary, to the superior court in and for the county in which was held the last general meeting of the board prior to the refusal of the license, in case of refusal; and to the superior court in and for the county in which the hearing was had upon which such license was revoked, in case of revocation. The person desiring to appeal must serve or cause to be served on the said secretary a written notice of appeal containing a statement of its grounds, and must file in the said secretary's office an appeal bond with a good and sufficient surety to be approved by the secretary, to the State of Washington, conditioned for the speedy prosecution of such appeal and the payment of such costs as may be adjudicated against him upon such appeal. Said secretary must within ten days after service of said notice and filing, and the approval of the said appeal bond, transmit to the clerk of the court to which the appeal is taken a certified copy, under the seal of the board, of the decision and the grounds in case of refusal, and in addition a certified copy under said seal of the complaint in the case of revocation, with the bond and notice of appeal. The clerk must thereupon docket such appeal causes, and they stand for trial in all respects as ordinary civil actions, and like proceedings are had thereon. On appeal the cause is tried *de novo*. Either party may appeal from a judgment of the superior court to the supreme court in like manner as in civil actions within sixty days after the rendition and entry of such judgment. If the judgment be in favor of the party appealing from the decision of the board, and the examining board does not appeal within sixty days, in that case at the end of sixty days the board shall immediately issue to the successful party the usual license to practise medicine and surgery, and in addition reinstate upon its records the name of such successful applicant, in case of revocation. In case of appeal to the supreme court by the board, no such license shall be issued nor reinstatement required until the final determination of the cause. In case the final decision of the supreme court be against the board, then the said court shall make such order as may be necessary and the board shall act accordingly. No appeal bond can be required of the board, nor any costs adjudged or taxed against the same (*ib.*, s. 6; Ballinger, s. 3,017).

Filing Authority—Notice of Change of Location or Death or Revocation.—The person receiving a license must, before commencing the practice of medicine or surgery or any of their branches, file it, or a certified copy, with the county clerk of the county where he or she resides,[1] and the county clerk is required to file said certificate or copy and enter a memorandum thereof, giving the date of license and the name of the person to whom it was issued, and the date of filing; and on notice to him of a change of location or the death of a person licensed or of revocation, the county clerk is required to enter a memorandum of said fact at the appropriate place in the record. In case of removal into another county, the person licensed must procure from the county clerk a certified copy of the said license, and file it with the county clerk of the county to which he or she shall remove (*ib.*, s. 7, as amended Act 1901, c. 42, s. 2; Ballinger, s. 3,018; Ballinger's Supp. 1903, s. 3,018).

Evidence.—Proof of failure to file the license or copy with the county clerk as provided is *prima facie* evidence of a violation of the act, punishable as provided. The county clerk's records are the only evidence required as proof of failure to file, but may be rebutted by competent testimony (*ib.*, s. 7, as amended Act 1901, c. 42, s. 2).

In prosecutions evidence that defendant has failed to file a license with the county clerk as required is *prima facie* evidence that the defendant is not a legally licensed practitioner (*ib.*, s. 8, as amended Act 1901, c. 42, s. 3; Ballinger, s. 3,019; Ballinger's Supp. 1903, s. 3,019).

Offence—Penalty.[2]—To practise medicine or surgery or

[1] Though the test is faulty, and a practitioner's qualifications may not be affected by the mere accident of his residence in the State at the time of the passage of the law, and though there may be no substantial reason why the community should not be protected from resident as well as non-resident charlatans and quacks, the wisdom of the act and its reasonableness or unreasonableness is a question for legislative discretion and not for judicial determination. State *v.* Carey, 4 Wash., 424.

The prescription of residence as a qualification does not affect a constitutional right. State *v.* Carey, 4 Wash., 424 (citing Fox *v.* Territory, 2 Wash T., 297; State *v.* Van Doran, 109 N. C., 864; Dent *v.* W. Va., 129 U. S., 121; People *v.* Phippin, 70 Mich., 6).

[2] Sec. 8 (of the law of 1889–90, p. 114) defines the crime. It is not merely an enumeration of probative facts, which need not be alleged in the complaint. It would be a defence to the indictment to prove that the party charged had neither appended to his name the prescribed letters nor for a fee prescribed, etc. It is necessary to allege and prove the commission of one of the acts in the definition to justify a conviction. This

either of its or their branches without obtaining and filing a license or contrary to this act is a misdemeanor,[1] punishable with a fine of from $50 to $100, or imprisonment in a county jail from ten to ninety days, or both. Each day of illegal practice is deemed a separate offence.

DEFINITION.[2]—Any person is regarded as practising who shall have and maintain an office or place of business with his or her name and the words physician or surgeon, "Doctor,"[3] "M.D.," or "M.B." in public view, or shall assume or advertise the title of doctor or any title which shall show or shall tend to show that the person assuming or advertising is a lawful practitioner of any of the branches of medicine or surgery in such a manner as to convey the impression that he or she is a practitioner of medicine or surgery under the laws of this State, or who shall practise medicine or surgery under a false or assumed name or under cover of the name of some legal practitioner or personate any legal practitioner, or for a fee prescribe, direct, or recommend for the use of any person any drug or medicine for the treatment, care, or relief of any wound, fracture, or bodily injury, infirmity, or disease; but the chapter does not apply to dentists

is a crime not known to the common law. If the statute has failed to define it, it is not defined, and the defendant is called upon to answer to an undefined crime where no particular act constituting the crime is charged. State *v.* Carey, 4 Wash., 424.

The defendant has a right to be informed of the precise nature of the offence with which he is charged. An indictment or complaint under this act, which charges that the defendant at a time and place named "did then and there unlawfully practise medicine" within the State, without having first obtained a license, does not charge a crime. The crime is appending the letters named in the act, to the name or prescribing for a fee; and the indictment is defective. It should specifically charge the offence of which he is accused, naming the person for whom he prescribed (if accused of prescribing). The indictment must contain, not the name of the offence, but a statement of the acts constituting the offence. State *v.* Carey, 4 Wash., 424.

A defective indictment is not cured by the verdict, where the facts stated do not constitute a crime, and a motion in arrest of judgment, after a verdict of guilty, should be sustained. State *v.* Carey, 4 Wash., 424 (Dunbar and Stiles, T. Anders, C. J., concurring, but expressing doubts on constitutionality of the law, Hoyt and Scott dissenting).

[1] See note 3, p. 515.

[2] See n. 2, p. 519.

[3] Where the indictment charged that accused maintained an office and advertised the title of doctor, it was not proof of this charge to introduce a newspaper advertisement of a person styling himself "Dr.," and stating that he maintained an office, without proving that the accused authorized the advertisement and was the person named therein. From the newspaper advertisement alone there was not sufficient proof to authorize a verdict of guilty, and the accused should be discharged. State *v.* Dunham, 31 Wash., 636.

while confining themselves strictly to dentistry [1] (*ib.*, s. 8, as amended Act 1901, c. 42, s. 3; Ballinger, s. 3,019; Ballinger's Supp. 1903, s. 3,019).

PROSECUTIONS.—Justices of the peace and the superior court have concurrent jurisdiction, and it is the duty of the respective county or district attorneys to prosecute violations (*ib.*, s. 8, as amended Act 1901, c. 42, s. 3; Ballinger, s. 3,019; Ballinger's Supp. 1903, s. 3,019).

REGULATIONS.—The board has authority to prescribe and establish all needful rules and regulations to carry this chapter into effect (*ib.*, s. 9; Ballinger, s. 3,020).

FORMER PRACTITIONERS.—All persons licensed under section 2,289 of the laws of Washington Territory, 1881,[2] or having complied with its provisions, are to be taken and considered as licensed under this act,[3] and the secretary of the board is required to enter the names of such persons upon the register kept by him, as licensed physicians and surgeons on their written application (*ib.*, s. 10; Ballinger, s. 3,020, *a*).

FEE.—To the treasurer of the board, for examination, $25 (*ib.*, s. 3, as amended Act 1901, c. 42, s. 1, and Act 1905, c. 41).

WEST VIRGINIA.

BOARD OF HEALTH.—The State board of health, appointed by the governor (which is the examining board—*infra*), consists of two physicians residing in each district, graduates of reputable medical colleges, who shall have practised medicine not less than six years continuously (Code, 1899, c. 150, s. 1).

[1] For decision under the analogous law regulating the practice of dentistry see State *ex rel.* Smith *v.* Dental Examiners, 31 Wash., 492.

[2] The provisions of ch. clxix. of the Code of Washington Territory, respecting the practice of medicine, were not in any sense *ex post facto* laws or bills of attainder. Fox *v.* Territory of Washington, 2 Wash. Ter. R., 297 (1884).

The prescription of qualifications, excluding many who might otherwise engage in the practice, does not proceed upon the idea of punishment for past acts (*ib.*).

[3] The legislature, in exempting those engaged in practice at the time of the passage of the law, did so for good and valid reasons. This did not entitle other classes of persons to claim the exemption under the 14th amendment, U. S. Constitution, or any other clause of the federal Constitution. Fox *v.* Territory of Washington, 2 Wash. Ter. R., 297.

For the same reason, it is no objection to the law that it exempted physicians and surgeons living adjacent to the territory, who might cross the border to attend patients (*ib.*).

QUALIFICATION.[1]—The following persons and no others are permitted to practise medicine:

[1] There was no provision of secs. 9 (prescribing the qualification) and 15 (defining the offence), ch. 93, Acts 1882, which violated any provision of the Constitution of the United States or of the State of West Virginia. State *v.* Dent, 25 W. Va.

The act (1882, c. 93) is not a special, but a general law. State *v.* Dent, 25 W. Va., 1.

The courts cannot determine whether the action of the legislature in prescribing the qualifications is wise; that is a legislative question. State *v.* Dent, 25 W. Va., 1.

For the courts to disregard the act of the legislature and determine in each case whether qualification to practise exists, would itself be an unconstitutional invasion of the legislative function. State *v.* Dent, 25 W. Va., 1.

The courts cannot constitutionally declare void an act of the legislature, within the scope of its authority, because it is arbitrary, unjust, or oppressive. State *v.* Dent, 25 W. Va., 1.

It is the right of every citizen of the United States to follow any lawful profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. All vocations are open to every one on like conditions. The right to continue their prosecution is often of great value and cannot be arbitrarily taken away. But it is not an arbitrary deprivation, to deny its exercise, when the possessor has failed to comply with conditions imposed by the State for the protection of society. Dent *v.* W. Va., 129 U. S., 114.

The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure, or tend to secure them, against the consequences of ignorance and incapacity as well as of deception and fraud. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. Dent *v.* West Va., 129 U. S., 114.

If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation. Dent *v.* W. Va., 129 U. S., 114.

A lengthy justification of laws regulating admission to the practice of medicine and of fresh requirements corresponding to the advances in medical science for continuance in practice, will be found in the opinion of Mr. Justice Fuller in Dent *v.* W. Va., 129 U. S., 114.

No one has a right to practise medicine without having the necessary qualifications of learning and skill. Dent *v.* W. Va., 129 U. S., 114.

Legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case. Dent *v.* W. Va., 129 U. S., 114.

The provisions of the United States Constitution forbidding deprivation of property without due process of law are intended to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen. There is nothing arbitrary about the law of West Virginia (1882, c. 93). It applies to all physicians, except those who may be called for a special case from another State; it imposes no conditions which cannot be readily met. It is enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. Dent *v.* West Va., 129 U. S., 114. If in the proceedings under the statute there

1. Persons legally entitled to practise medicine in the State at the time of the passage of the act (1895).[1]

2. Persons who shall pass an examination before the State

should be any unfair or unjust action on the part of the board in refusing a certificate, a remedy would be found in the courts of the State (*ob. dic.*). Dent *v.* West Va., 129 U. S., 114.

But no imputation of unfairness or injustice on the part of the board in refusing a certificate can be made where, after it decided that the applicant had presented an insufficient diploma, he failed to submit himself to examination. Dent *v.* West Va., 129 U. S., 114.

Dent *v.* West Va., 129 U. S., 114, distinguishes between cases like Cummings *v.* Missouri, 4 Wall., 277; *ex parte* Garland, 4 Wall., 333, where the law is designed to deprive persons of their right to continue in their professions for past acts or past expressions of desires and sympathies, having no bearing on their fitness to continue in their professions, and cases where the law is intended to secure such skill and learning in the profession of medicine that the community may trust with confidence those receiving a license under the authority of the State.

By the common law physicians undertaking to practise their profession were held to that degree of skill and capacity which ordinarily belongs to those who practise medicine. State *v.* Dent, 25 W. Va., 1, citing Seare *v.* Prentice, 8 East, 348.

In Dent *v.* W. Va., 25 W. Va., 1, will be found an instructive discussion at length of the constitutional principles, which it has often been contended, but almost always without success, are violated by the laws regulating admission to the practice of medicine and surgery. In the same case will be found at some length a chronological consideration of the laws in the United States prescribing qualifications for practitioners of medicine and surgery.

Notwithstanding the provision of the West Virginia bill of rights, that all men by nature have the right to the enjoyment of liberty, with the means of acquiring and possessing property, they have not the right to acquire property by the practice of medicine if they have no qualification to practise. And the legislature may declare that one shall not acquire property by the practice of medicine unless he possesses the requisite qualifications, and can give to the community some assurance that he will not destroy the health of others. State *v.* Dent, 25 W. Va., 1.

[1] In State *v.* Dent, 25 W. Va., 1, Dent was practising as a physician at the time of the passage of the act of 1882, c. 93, regulating admission to practise; he had been so practising for six years, but not for ten years (the period of practice, which under the law entitled him to continue in practice); he was in active and successful practice, and the denial to him of the right to practise deprived him of his only customary means of supporting himself and family; he presented a certificate from a medical college, and asked from the qualified members of the board a certificate entitling him to practise, which they refused on the ground that his college was not *reputable* as defined by the board of health; he continued to practise, was indicted, and found guilty: The law provided that no person should be permitted to practise except graduates of a reputable medical college, practitioners for ten years in the State, and others who should pass a satisfactory examination, *held* that the law was nevertheless constitutional and valid, citing at length and with approval the reasons assigned by Hawley, C. J., in *ex parte* Spinney, 10 Nev., 328 (see *supra*, p. 363).

If the importance of a decision as a leading case depends upon the frequency with which it is cited, the case of State of West Virginia *v.* Dent, 25 W. Va., 1, affirmed 129 U. S., 114, may be regarded as the leading case in the United States on the subject of the constitutionality and validity of laws regulating admission to practise medicine and surgery.

board of health and shall receive certificates from said board to that effect (*ib.*, s. 9).

The secretary of the State board of health or any member thereof is empowered to administer oaths and take and certify affidavits in any matter or thing pertaining to the business of the board or any of its members (*ib.*, s. 18).

EXAMINATIONS.—Not less than three examinations in each year are required to be held at such points in the State as shall be most convenient to those presenting themselves for examination or to the board of health. Written and oral questions shall be submitted to the applicants for license, covering all the essential branches of the sciences of medicine and surgery, and the examination shall be a thorough and decisive test of the knowledge and ability of the applicants (*ib.*, s. 9).

The State board of health is required to give timely notice of the time and place of each examination by publication in at least three newspapers of general circulation in the State, and persons wishing to present themselves for examination should notify the secretary of said board (*ib.*, s. 9).

In the examination of an applicant who professes the homœopathic or eclectic school of medicine, the State board is required to call to their assistance a homœopathic or eclectic physician duly licensed to practise medicine in the State (*ib.*, s. 9).

If a certificate is refused to an applicant, he may again present himself for examination within one year without payment of additional fee; if then refused, he may as often as he see fit, on payment of $10, be examined until he obtains a certificate (*ib.*, s. 11).

Examinations may be wholly or partly in writing, and shall be of an elementary and practical character, embracing the general subjects of anatomy, physiology, chemistry, materia medica, pathology, pathological anatomy, surgery, and obstetrics, but sufficiently strict to test the qualifications of the candidate[1] as a practitioner of medicine, surgery, and obstetrics (*ib.*, s. 12).

[1] It is not a sound objection to the validity of the law that the board can, under the law, at pleasure decide what is a reputable and what a disreputable college. The law is not invalid because it fails to define, or leaves it to the board to determine in each case what is a reputable college. State *v.* Dent, 25 W. Va., 1.

The objection that a law leaves arbitrary or tyrannical power to an administrative board is properly addressed to the legislature and not to the courts. While it remains a law, the courts must enforce it. State *v.* Dent, 25 W. Va., 1.

LICENSE.—The president and secretary of the board of health issue certificates to all who successfully pass their examination, and such certificates, after being recorded, are deemed licenses to practise medicine and surgery in all their branches (*ib.*, s. 9).

SCHOOL OF MEDICINE.—No applicant for license is to be rejected because of his or her adherence to any particular school or theory of medicine (*ib.*, s. 9); nor to have a license refused or revoked for that reason (*ib.*, s. 10).

EXCEPTION.—This section does not apply to physicians, living in other States and duly qualified to practise medicine therein, called into consultation into this State by a physician legally entitled to practise medicine in this State under these sections (*ib.*, s. 9).

RECORDING.—Every person holding a certificate must have it recorded in the office of the secretary of the State board of health, and the secretary is required to indorse on said certificate the fact of such recordation and deliver the same to the person named therein or his order (*ib.*, s. 10).

REGISTRATION.—Every physician and accoucheur shall register his name and post-office address with the clerk of the county court of the county in which he resides and with the clerk of the court of every other county in which he intends to practise, to be registered in a separate book, which shall always be open to inspection without fee (Code, 1899, c. 63, Title, Marriages, Births, and Deaths, s. 18, as amd. c. 12, Act 1904).

REFUSAL—REVOCATION.—The State board of health may refuse certificates to individuals guilty of malpractice or dishonorable conduct, and may revoke certificates for like causes; such revocation being after due notice and trial by the said board, with right of appeal to the circuit court of the county in which such individual resides; but no such refusal or revocation shall be made by reason of his belonging to or practising in any particular school or system of medicine (Code 1899, c. 150, s. 10).

MIDWIVES.—The chapter does not apply to females practising midwifery (*ib.*, s. 12).

DEFINITION—EXCEPTIONS.—Any person is regarded as practising medicine who professes publicly to be a physician, and to prescribe for the sick, or who appends to his name "M.D." This act also applies to apothecaries and pharmacists who prescribe for the sick. It does not apply to commissioned officers

of the United States army and navy and marine hospital service (*ib.*, s. 13).

Itinerant Physician or Vender.[1]—Any itinerant physician desiring to practise medicine in the State, or itinerant vender of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of disease or injury, or who shall by writing or printing or in any other method publicly profess to cure or treat diseases, injuries, or deformities by any drug, nostrum, manipulation, or other expedient, shall before doing so pay to the sheriff of every county in which he desires to practise a special tax of $50 for each month or fraction of a month he shall so practise in such county, and take his receipt in duplicate therefor. He shall present said receipts to the clerk of the county court of such county, who shall file and preserve one of them in his office and indorse on the other, "A duplicate of this receipt has been filed in my office," and sign the same. For such a person to practise or attempt to practise in any county without having paid such tax and filed such receipt and obtained such indorsement, or to practise or attempt to practise for a longer time than that for which he has paid a tax, is a misdemeanor punishable with a fine of from $100 to $500. Any person who shall travel from place to place and by writing, printing, or otherwise publicly profess to cure or treat diseases, injuries, or deformities is deemed an itinerant physician subject to the taxes, fines, and penalties of this section (*ib.*, s. 14).[2]

Penalty.—To practise or attempt to practise medicine, surgery, or obstetrics without complying with section 9 [3] is a misde-

[1] The provisions of s. 14, c. 150, Code imposing a tax on itinerant venders were characterized as a crudely drawn statute in State *v.* Ragland, 31 W. Va., 453, where it was said that though its provisions are by no means clear, it is intended to prohibit the practice which it taxes, and to prevent any one, whether a physician or not, from travelling from county to county vending drugs, etc., unless the special tax were paid, and to prevent any one who should by writing, etc. (as in the act), from doing so until he had paid the tax; it was intended to reach all, whether physicians or not. And a count in an indictment charging the defendant with doing all three classes of forbidden acts is good, and is met by proof of any one of the offences charged.

[2] Under sec. 14 a person can be convicted who at the time of the sale disclaims that he is a physician, and that he treats diseases, and asserts that he is selling a proprietary remedy patented by him under the laws of the United States, where the wrapper in which the remedy is sold states that it is good for use in case of certain named diseases (*e.g.*, neuralgia). State *v.* Ragland, 31 W. Va., 453.

[3] See n. 1, p. 522.

meanor, punishable, for every offence, with a fine of from $50 to $500, or imprisonment in a county jail from one month to twelve months, or both. To file or attempt to file as his own a diploma or certificate of another, or a false or forged affidavit of identity, or wilfully swear falsely to any question propounded to him on examination or to any affidavit required to be made and filed, is punishable with confinement in the penitentiary from one to three years, or imprisonment in a county jail from six to twelve months, and a fine of from $100 to $500 (*ib.*, s. 15).

FEE.—To the State board of health, or its examining members, for examination, $10, not to be returned if certificate refused; on subsequent examination within one year, no additional fee is required; if refused on such second examination, on subsequent examinations $10 for each examination until certificate obtained (*ib.*, s. 11).

WISCONSIN.[1]

MEDICAL EXAMINERS.—The governor appoints a board of medical examiners known as the Wisconsin State Board of Medical Examiners, of eight members, from three separate lists of ten names each presented every second year, one by the Wisconsin State Medical Society, one by the Homœopathic Medical Society of Wisconsin,[2] and one by the Wisconsin State Eclectic Medical Society, and one list of five names presented by the Wisconsin State Osteopathic Association; in case of failure of any such society to present such list, the governor may fill vacancies by appointment from the last list filed by such association or society previous to the vacancy. The proportion of the different schools of medicine[3] must be preserved. No instructor, stockholder, member of, or person financially interested in, any school, college, or university having a medical department,[4] or of any school of osteopathy shall be appointed a member of the board. Three members of the board shall be allopathic, two homœopathic, two

[1] In 1902 the statutes were said by the Supreme Court to be in considerable confusion, in Schaeffer *v.* State, 113 Wis., 595. The present act was passed in 1903.

[2] See n. 4, p. 530.

[3] To constitute a school of medicine it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies; which each member is supposed to observe in any given case. Nelson *v.* Harrington, 72 Wis., 591.

[4] On method of proof of existence of a medical college, see Wendel *v.* State, 62 Wis., 300.

eclectic, and one osteopathic; all shall be licentiates of said board. No member shall serve more than two consecutive terms (Act 1903, c. 426, s. 1).

The president and secretary may administer oaths for the accomplishment of the objects of the board (*ib.*, s. 2).

The board is required to hold regular meetings on the second Tuesday of January, at Milwaukee, on the second Tuesday of July at Madison, and such other meetings at such other times and places as it may from time to time determine (*ib.*, s. 2).

Register.—The board is required to keep a record of its proceedings and a register of all applicants for license, with a record showing their ages, time spent in study of medicine, name and location of all institutions granting to such applicants degrees [1] or certificates of lectures in medicine, surgery or osteopathy. The register is required to show whether the applicant was rejected or licensed, and said books and register shall be *prima facie* evidence of all matters required to be kept therein (*ib.*, s. 2).

Examinations[2]—Qualification.[3]—Persons commencing the practice of medicine, surgery or osteopathy in any of their branches shall apply to the board at the time and place designated by the board or at any regular meeting for license, and shall present to the board a diploma[1] from a reputable college[4] of medicine and surgery or osteopathy. A college to be deemed reputable by the board shall require at least four courses of not less than seven months each before graduation (no two of said courses to be taken within any one twelve months) and that shall require for admission thereto a preliminary education equivalent

[1] A medical college, properly organized under the law of Wisconsin (in 1881), has the power to issue diplomas to its students notwithstanding the failure of its certificate of incorporation to state that as one of its powers. Wendel *v.* State, 62 Wis., 300.

[2] It is no ground of complaint by one who is compelled to submit to an examination that others also required to submit to examination are not required to have the same educational qualification (*e.g.*, osteopaths), where the complaining party asserts that it is conceded that he has the necessary educational qualifications. State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431.

[3] With the policy of the law, so long as it meets constitutional requirements, the courts have nothing to do. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

On use of "*Quack*" in its reference to a physician, as libel *per se*, see Elmergreen *v.* Horn, 115 Wis., 385.

Quack doctor, a mere pretender in his profession, a person not possessing the skill of a reputable practitioner of medicine, though assuming to have such skill. Elmergreen *v.* Horn, 115 Wis., 385.

[4] See n. 4, p. 527.

to that necessary for entrance to the junior class of an accredited high school in the State, including a one year's course in Latin, and that shall after 1906 require for admission to such school a preliminary education equivalent to graduation from an accredited high-school of this State, and [applicants] shall submit to an examination in the various branches in medicine and surgery usually taught in reputable medical colleges; or, if the applicant be an osteopath, he or she shall present a diploma from a regularly conducted college of osteopathy [1] maintaining a standard in all respects equal to that hereby imposed on medical colleges as to preliminary education, said college after 1904 to give three courses of eight months each, no two courses to be given in any one twelve months, and after the year 1909 such college shall give four courses of seven months each, as hereinbefore provided for medical colleges, and [such applicant] shall pass the regular examination of such board in anatomy, histology, physiology, obstetrics, gynæcology, pathology, urinalysis, chemistry, toxicology, dietetics, physical and general diagnosis, hygiene, and theory and practice of osteopathy (Act 1903, c. 426, s. 3).

The examination in materia medica, therapeutics, and practice shall be conducted by members of said board representing the school of medicine which the applicant claims or intends to follow (*ib.*, s. 3).

License.—After examination as hereinbefore provided, the board, if it find the applicant qualified, shall grant a license to the applicant to practise medicine and surgery in all their branches in this State, or a license to practise osteopathy therein; the license can only be granted by the consent of not less than six members, and shall be signed by the president and secretary and attested by the seal of the board (*ib.*, s. 3).

Osteopaths.—Osteopaths, when so licensed, shall have the same rights and privileges and be subject to the same laws and regulations as practitioners of medicine and surgery, but shall not have the right to give or prescribe drugs or to perform surgical operations (*ib.*, s. 3).

Special Provisions.—Provided, however, that any student who is exempted [2] as a matriculant of any medical col-

[1] See n. 1, p. 528.

[2] The proviso of chap. 306, Act 1901, extending to those then matriculated in a medical college of the State the

lege of this State under chapter 306 of the Laws of 1901,[1] whose name is now (May 29th, 1903)[2] on file with the Wisconsin State board of medical examiners, shall, on the presentation of a diploma[3] from any Wisconsin college, and on the payment of the fees specified in the act, and having satisfied said board that he or she is a person of good moral character, be licensed to practise without further examination by such board, provided that said college maintains *its* (*sic!*) herein required (*ib.*, s. 3).

Former Practitioners.—Every person practising medicine or surgery in Wisconsin,[4] who at the passage and publication of

privilege of admission to practise on presentation of a diploma, while it required all other beginners to present a diploma and pass an examination did not violate Sec. 2, Art. IV. of U. S. Const., nor the Fourteenth Amdt. U. S. Const. (respecting privileges and immunities of citizens of the United States), nor Sec. 1, Art. I. of the Const. of Wis. (respecting equal rights), nor that provision of Fourteenth Amdt. U. S. Const. respecting due process of law, and equal protection of the laws. These constitutional provisions do not limit the *police power*. Where the community at large is jeopardized by unrestrained freedom of will and action, restraining laws may be passed which affect all individuals alike, who are conditioned and situated alike with respect to the subject under consideration, but the classification must not be arbitrary nor for the purpose of discrimination alone; it must be made on grounds and in recognition of conditions or characteristics which are germane to the legitimate exercise of police legislation. Within these rules the legislature may provide that some people may and some may not practise medicine, provided the characteristics and conditions of distinction tend to make their exercise of the profession more beneficial or less perilous to the community than the class excluded. The exception from examination of present matriculates of local medical colleges is not an unconstitutional classification; there is a distinction, and the weight to be given to it is for the legislature, not the courts, to determine. The fact that some colleges outside of the State give as good or a better education does not prevent this classification. State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431.

State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431, collates the laws of States which discriminate in favor of graduates of local institutions, which have been sustained by the courts.

[1] The provision of the Act of 1901, c. 306, exempting matriculates was as follows: *Provided* that any student now (1901, May 8th) matriculated in any medical college of the State, which requires four courses of six months each as a prerequisite of graduation, no two courses to be taken within one twelvemonth, shall on presentation of his diploma from such medical college, and on payment of the fees, be admitted to practise without further examination by such board (Law 1901, c. 306).

[2] The Act of 1903, c. 426, provided that it should take effect and be in force from and after its passage and publication. It was approved May 22d, 1903, and appears to have been published May 29th, 1903.

[3] See n. 1, p. 528.

[4] *Homœopathists* could organize a county medical society under the law (as it existed in 1880); the term "physicians and surgeons" in the law for such organizations meant all who practised physic and surgery, and were recognized by the people as physicians and surgeons, and was not limited to one school of practitioners in preference to all others. Those homœopathists who practise in this State are so numerous and their reputation for learning and skill in their profession is so well established,

this act (May 29th, 1903)[1] has not received a license from said board, and who shall after such passage and publication present a diploma[2] from a reputable[3] medical college[4] and give satisfactory evidence of having been a reputable practitioner of medicine and surgery in Wisconsin continuously since July 1st, 1897,[5] shall

that they are not excluded from the designation physicians and surgeons in the statutes. Raynor *v.* State, 62 Wis., 289.

[1] See n. 2, p. 530.

[2] See n. 1, p. 528.

[3] *Reputable* in laws of this class has its ordinary meaning, it is an additional requirement, it is not merely equivalent to other requirements also required by the law, of such a college. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569, citing People *ex rel.* Sheppard *v.* Ill. State Bd. 110 Ill. 180; Ill. St. Bd. *v.* Cooper, 123 Ill., 227.

What is reputable in a college must be determined from the standpoint of men of scientific attainments in the line of work it represents, not that of mere laymen. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

For an illustration of a state of facts legally justifying a board in determining that a college is not reputable, see State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

The burden to establish the good repute of a college is on the applicant; if the board has previously determined that the institution is not reputable, it may properly regard that determination and accept it in the absence of controlling evidence to the contrary tendered and produced by the applicant. The board is not, of its own motion, required to make a new investigation of the same institution upon every application for a license. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

A refusal to reinvestigate is warranted till by lapse of time or some circumstance brought to the attention of the board, reasonable ground is furnished for a belief that a material change has or may have taken place (*ib.*).

The court will assume that members of the board are actuated to deal justly with applicants. They should be willing to resolve reasonable doubts in favor of the candidate so far as relates to the making of inquiries on questions of fact on which his application may turn. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

A re-investigation of the character of an institution should be made upon a request accompanied by a reasonable showing of a material change in regard to matters in which it was found deficient upon a previous investigation. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

So long as the law places no limits upon the methods by which it shall gather information on the subjects for its decision, the board may proceed in any reasonable way to ascertain the repute of a college, and candidates for licenses must submit to its judgments, unless they transgress the boundaries of reason and common sense. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

[4] The question what is the reasonable limit of the board's investigation is a judicial question, but the inquiry cannot be taken away from the board and conducted by a court. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

A board can hold that an institution is not a reputable institution, upon evidence of its character a year previous to the graduation of the applicant. There is a presumption of continuance; lapse of time simply weakens the force of the presumption, until it may cease to have any force; but the lapse of one year in respect to the reputability of a college has no such weakening effect. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

The question of fact is the reputability at the time of graduation, but it may be established by evidence of the reputability at a prior time, not too remote to make the presumption of continuance of no force. State *ex rel.* Coffey *v.* Chittenden, 112 Wis., 569.

[5] A certificate of the register of deeds

be granted a license [1] without examination upon the payment of a fee not exceeding $5, as determined by said board (*ib.*, s. 3).

Any person applying for such license shall, if he or she be possessed of a certificate of registration issued under and according to the provisions of chapter 87, Laws 1899, present such certificate to said board with the diploma [2] and application *of* (*sic !*) such license, and surrender said certificate on the issuance of said license; the registration fee paid for same shall be deducted from the last named fee (*ib.*, s. 3).

Practitioners of Other States.—Any practitioner of medicine or osteopathy holding a certificate from any other State board imposing requirements equal to those established by the Wisconsin State board may, on presentation of the same with a diploma from a reputable medical or osteopathic college,[3] be admitted to practise in Wisconsin without an examination, at the discretion of the board, on the payment of the fee fixed by the board, not exceeding $25 (*ib.*, s. 3).

Any practitioner of medicine or surgery holding a license from the State board of medical examiners of any adjoining State, dated since January 1st, 1901, shall, on presentation of the same within one year from the taking effect of this act (May 29th, 1903),[4] accompanied by a certificate from the secretary of the

of a county that there is no certificate of organization of a county medical society on file in his office is not competent evidence to establish that such society is not incorporated. Raynor *v.* State, 62 Wis., 289 (1885).

The fact that a diploma was issued to a practitioner by a county medical society is *prima facie* evidence that he was entitled to the diploma and to be a member of the society. Raynor *v.* State, 62 Wis., 289.

On the evidence to prove the organization of a county medical society, see Raynor *v.* State, 62 Wis., 289.

[1] A person claiming a right to a certificate of admission to practise cannot question the validity of a provision of the statute under which he claims the right. State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431, citing Hart *v.* Folsom (N. H.), 47 Atl. R., 603. If he were being prosecuted for practising without a certificate it would be different (*ib.*).

An act of the legislature cannot be set aside as unconstitutional at the instance of one who is not a sufferer by its unconstitutionality. State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431.

For the principles which should govern a court in issuing a *mandamus* compelling a board of examiners to issue a license, see State *ex rel.* Coffey *v.* Chittenden, 112, Wis., 569. Where there is no reasonable ground to justify a decision other than one way, and there is a failure to act accordingly, the remedy is broad enough to compel the making of a decision (*ib.*). But where the board reaches a conclusion upon insufficient or improper evidence, a court usurps the function of the board when it directs it to reach a contrary conclusion, upon evidence submitted first to the court; the remedy should be to direct the board to try the question over again upon proper evidence (*ib.*).

[2] See n. 1, p. 528.

[3] See n. 4, p. 527.

[4] See n. 2, p. 530.

State board of medical examiners of the State issuing the license that such applicant is a reputable practitioner of medicine and surgery, be licensed to practise medicine and surgery in this State without an examination, at the discretion of the board, on payment of the fee (*ib.*, s. 4.)

EXCEPTIONS.—The provisions of this act do not apply to commissioned surgeons of the United States army, public health, marine hospital service, or to physicians or surgeons of other States or countries in actual consultation with resident physicians of this State (*ib.*, s. 4).

REQUIREMENTS.—Every person [1] hereafter (May 29th, 1903)[2] practising medicine, surgery, or osteopathy in the State shall be required to have the license herein provided for, or heretofore (*i.e.*, prior to May 29th, 1903)[2] issued by the Wisconsin State board of medical examiners, or a certificate of registration issued pursuant to the provisions of chapter 87 of the laws of 1899 (*ib.*, s. 5).

RECORDING.—Any person having, or hereafter (*i.e.*, May 29th, 1903[2]) receiving, a license according to the provisions of this act or having such certificate of registration, shall record the same with the county clerk of any county in which he shall practice (*ib.*, s. 5). The clerk is required to enter a memorandum thereof, giving the date of the license or certificate, name of the person to whom it was issued and date of recording, in a book (*ib.*).

Any person failing to record his or her license or registration certificate as provided in this act shall not exercise any of the rights or privileges conferred thereby (*ib.*).

OFFENCE [3]—PENALTY.—Any person beginning such practice[4] without having obtained such license, or having obtained such license contrary to law, or who not having such license or certificate of registration shall advertise or hold himself or herself out to the public as a physician, surgeon, osteopathist, or specialist in any of the branches of medicine, surgery, or osteopathy, or who shall use the title of doctor [5] or append to his or her name

[1] The right to practise medicine in a State is not one of the privileges or immunities of citizens of the United States. State *ex rel.* Kellogg *v.* Currens, 111 Wis., 431.

[2] See n. 2, p. 530.

[3] The offence was not known to the common law. Schaeffer *v.* State, 113 Wis., 595.

[4] On form of complaint for violating the statute see Schaeffer *v.* State, 113 Wis., 595.

[5] Where the prosecution was under secs. 1,436 and 4,603, *a* of Stats. 1898,

the letters M.D. or M.B., meaning doctor or bachelor of medicine, or "D.O.," meaning doctor or diplomat of osteopathy, or any other letters of designation meaning any of the titles enumerated in this section (sec. 5), shall be punished by a fine of $50 to $100 for each offence, or by imprisonment in the county jail for not exceeding three months, or both such fine and imprisonment (*ib.*, s. 5).[1]

MALPRACTICE.—Any person practising medicine, surgery or osteopathy, or without authority assuming the title of doctor of medicine, doctor or diplomat of osteopathy or bachelor of medicine or physician or surgeon, or osteopathist or osteopath, shall not be exempted[2] from, but shall be liable to, all the penalties and liabilities for malpractice,[3] which physicians, surgeons, or osteo-

it was held that to make it an offence under sec. 4603, *a*, to assume the title of doctor it must appear that the accused has not a diploma from any incorporated medical college or society, nor a license from the State board of medical examiners. Schaeffer *v.* State, 113 Mo., 595 (1902). The present act was passed in 1903.

It is not an offence to assume the title of doctor if the person has one or the other of the said qualifications (*ib.*).

A complaint under sec. 4,603, *a*, which merely accuses a person of assuming the title of doctor without having obtained a license from the State board of examiners, states no offence. Schaeffer *v.* State, 113 Wis., 595 (1902).

[1] The law (of 1881, c. 256) casts the burden of proof of authority to use the title "doctor" on the accused. Raynor *v.* State, 62 Wis., 289 (1885).

This is no injustice to the accused, and the contrary would make the proof almost impossible (*ib.*).

[2] In an action for malpractice against a person, alleged to be a surgeon, it is not necessary to allege that he was legally qualified to practise as such. Crawty *v.* Stewart, 95 Wis., 490.

[3] A physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons in good standing of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the advanced state of medical or surgical science at the time. Nelson *v.* Harrington, 72 Wis., 591. See n. 3, p. 527.

One holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient and treats him for disease, cannot be exonerated from unskilfulness merely because he resorts to some peculiar method (*e.g.*, clairvoyancy) of determining the nature of the disease and the remedy therefor. Nelson *v.* Harrington, 72 Wis., 591.

It matters not that the patient, or those who are responsible for him, know the methods of the practitioner (*ib.*).

Where there was no evidence that clairvoyant physicians as a class treated disease upon any fixed principles, or that rules have been formulated which each practitioner is supposed to follow, as is the case with schools of medicine, recognizable as such, a clairvoyant physician was held legally bound to exercise the ordinary skill and knowledge of physicians in good standing practising in the vicinity and not merely the ordinary skill and knowledge of the system of clairvoyants. Nelson *v.* Harrington, 72 Wis., 591.

On the distinction between the right of a practitioner not belonging to a recognized school of medical

pathists are liable to, and ignorance on the part of any such person shall not lessen such liability for failing to perform or for negligently or unskilfully performing or attempting to perform any duty assumed and which is ordinarily performed or required to be performed by physicians, surgeons, or osteopathists (*ib.*, s. 5).

REVOCATION OF LICENSE.—If any person licensed or registered by the board shall be convicted of any crime committed in the course of his professional conduct, the court in which such conviction is had may, in addition to any other punishment imposed pursuant to law, revoke such license or certificate (*ib.*, s. 5).

REGULATIONS OF BOARD.—The board shall have power to adopt such rules for its government and may require the filling out of such blanks by applicants as it may deem necessary to ascertain the true character and qualifications of applicant for license (*ib.*).

REFUSAL OF LICENSE.—The board may in its discretion refuse a license to any one who does not furnish satisfactory proof of good moral and professional character (*ib.*).

DEFINITION.—Every person is regarded as practising medicine or osteopathy within the meaning of this act who shall append to his or her name the letters M.D., or M.B., or D.O., Doctor, Dr., or any other letters or designation with intent to represent that he or she is a physician or surgeon or osteopathist, or who shall for a fee prescribe drugs or other medical or surgical

practitioners, employed to render certain services in the treatment of disease, or of an intoxicated physician, to recover compensation for the services rendered (as illustrated in the case of a Christian Scientist suing for compensation, Wheeler *v.* Sawyer, 15 Atl. R., 67 Me., and in the case of an intoxicated physician, by McKleroy *v.* Sewell, 73 Ga., 657), and the degree of skill required of such practitioners (*e.g.*, clairvoyants) when sued for malpractice, see Nelson *v.* Harrington, 72 Wis., 591.

An interesting discussion of the liability of clairvoyant physicians for malpractice, though they do their best, is found in Nelson *v.* Harrington, 72 Wis., 591 (stated to be the first and only case on the subject in 1888).

It is intimated in Nelson *v.* Harrington, 72 Wis., 591, that a medical practitioner may protect himself by contract from liability for malpractice; a former statute (R. S. 1436, as it existed in 1894) provided that no person practising physic or surgery should recover compensation for such services unless the holder of a diploma or a member of a State or county medical society; it was intimated that the allegation of these facts might be necessary in a complaint in an action for compensation, in the face of a demurrer, but it was held that where it was alleged that plaintiff was hired as a physician, it was too late to raise the point by objection at the trial to evidence that the plaintiff was a qualified physician. Rider *v.* Ashland Co., 87 Wis., 160.

treatment or *oseopathic* (*sic!*) manipulation for the cure or relief of any wound, fracture, bodily injury, infirmity, or disease, provided nothing in this act shall be construed to apply to any dentist or resident refracting optician engaged in the practice of his or her profession (*ib.*, s. 6).

INVESTIGATION—PROSECUTION.—It is made the duty of the board of medical examiners to investigate all complaints in regard to the violation or disregard of, or non-compliance with the provisions of this act, and to bring all such cases to the notice of the proper prosecuting officers; and it is made the duty of the district attorney of the proper county to prosecute all violations of this act (*ib.*, s. 7).

DISQUALIFICATIONS.—No person practising medicine, surgery, or osteopathy shall have the right to collect by law any fees or compensation for the performance of any medical or surgical services,[1] or fees for any service as an osteopathist, or to testify in a professional capacity as a physician or surgeon or insanity[2] expert[3] in any case, unless he or she holds a license from the Wisconsin board of medical examiners, or the certificate of registration hereinbefore referred to, with a diploma[4] from a reputable

[1] See n. 3, p. 534.

[2] The law (Stats. 1898, s. 585) which prescribes the qualifications of examiners in lunacy of applicants for admission to the State hospital for the insane, does not confine medical expert testimony in lunacy cases to persons having the qualifications prescribed in that law. Lowe *v.* State, 118 Wis., 641, which see for a discussion of the qualifications of medical expert witnesses.

[3] The right or privilege of testifying as an expert is limited only by sec. 1,436, Stats. 1898. The Act of 1899, c. 87, does not take away this privilege for failure to record as prescribed by sec. 4. A physician is not excluded from testifying as an expert where he testifies that he is duly licensed; though that is a conclusion, it stands in the absence of anything controverting it or cross-examination. Allen *v.* Voje, 114 Wis., 1 (1902). The present act was passed in 1903.

[4] The fact that a man is a graduate from a school carries with it a presumption that he has a diploma; where the testimony is by deposition, and the person claiming to be a physician, testifies that he is a graduate, it will be presumed that he has a diploma, and it will be too late to object for the first time at the trial that he has not testified that he received a diploma; the receipt of a diploma may be fairly inferred from the testimony. The object of the statute (R. S. 1,436, as it existed in 1894) was to secure learning and skill, not merely a diploma, and the statute should be so construed as to advance the remedy intended. Where the intention is clear, too minute stress should not be laid on the strict and precise signification of words; and where the omission to state that the plaintiff had received a diploma was apparently an oversight, there was no presumption that he had not received one, and a decision in his favor would not be reversed for his failure to so state, though a diploma was the qualification under the statute. Rider *v.* Ashland Co., 87 Wis., 160.

Where a physician attempts to qualify as a medical expert witness, his qualifications may be proved by

medical college or society,[1] or a certificate of membership in a medical society, and has been duly recorded[2] as a practitioner in the State of Wisconsin, provided nothing in this act shall be construed as restricting any court in a criminal action from receiving the testimony of any person as a witness (*ib.*, s. 8).

FEES.—For examination, shall be fixed by the board, not to exceed $15, and $5 additional for the license issued, to be paid to the treasurer of the board (*ib.*, s. 3).

From former practitioner, without examination (see Title, FORMER PRACTITIONER, *supra*), not exceeding $5, as determined by the board (*ib.*, s. 3); from those presenting certificates issued under c. 87, laws 1899, the registration fee therefore shall be deducted from the new fee (*ib.*, s. 3).

From practitioners admitted from other States (see *supra*, PRACTITIONERS OF OTHER STATES) a fee, fixed by the board, not exceeding $25 (*ib.*, s. 3).

To county clerk, for recording license or certificate of registration, 50 cents (*ib.*, s. 5).

WYOMING.[3]

BOARD OF MEDICAL EXAMINERS.—The governor with the advice and consent of the senate appoints three regularly licensed physicians of the State to be a State board of medical ex-

his oral testimony without producing his diploma, or proving by record evidence the incorporation of the institution or society which granted it, or that he is a member of a State or county medical society. Any other rule would be a hardship to suitors which the legislature did not intend, as well as a hardship to the physicians themselves. It is the universal practice of the courts in Wisconsin to permit such qualifications to be proved by parole testimony. McDonald *v.* City of Ashland, 78 Wis., 251 (1890).

A graduate holding a diploma from a regularly incorporated medical college is qualified to testify as an expert, and the fact may be shown by his oral evidence. Allen *v.* Voje, 114 Wis., 1 (1902). The present act was passed in 1903.

[1] See n. 4, p. 527.

[2] Whether sec. 1,436 applies only to the testimony of physicians and surgeons, so as to induce them to comply with the law (as indicated in People *v.* Rice, 159 N. Y., 400), or whether it was intended to confine all medical expert evidence to qualified physicians and surgeons, so as to exclude trained nurses, who might otherwise be accepted as expert witnesses upon medical subjects within their training and experience, the court in Allen *v.* Voje, 114 Wis., 1, declined to decide. Where the trial court refused to permit the trained nurse to testify upon specific questions, as an expert, the court held it a discretionary matter in the particular case.

[3] The statutes of Wyoming in force December 1st, 1899, were revised and published under authority of the legislature. The text of the above synopsis is taken from the medical act of 1899, c. 18. In the revision the arrangement was slightly altered, as will be seen from the numbers of

aminers. Vacancies are filled for the unexpired balance of the term by appointment of the governor. (Act 1905, c. 45, s. 1.)

It is the duty of the board to pass on the qualifications and determine the fitness of all persons who may desire to practise medicine, surgery, and obstetrics, or who may publicly profess in any manner to assume the responsibility for the care or treatment of disease, injury, or deformity of human beings (*ib.*, s. 3).

QUALIFICATION.—Every person wishing to practise medicine in any of its departments shall possess the qualifications required by this act. He shall be a graduate of a regularly chartered college of the system which he claims to practise; said college must be recognized by the State board of health, or the State board of medical examiners of the State in which it is located; he shall give evidence of the fact that he is a person of good moral character, and that he *shall not be* the victim of such habits as shall cause him to endanger the lives of those entrusted to his care; he shall present his diploma to the State board of medical examiners for verification as to its genuineness; *said certificate* shall consist in the affidavit of the holder of the diploma that he is the lawful possessor of the same, and that he is the person therein named; such affidavit may be taken before any person authorized to administer oaths, and shall be attested under the hand and seal of such officer. He shall appear before the State board of medical examiners in person at a time and place appointed, and shall pass an examination sufficiently strict to test his qualifications as a practitioner (*ib.*, s. 4).

EXAMINATION.—The examination may be in whole or in part in writing; it shall be of an elementary and practical character, and upon anatomy, physiology, chemistry and toxicology, pathology, physical diagnosis, gynecology and the principles of surgery, obstetrics, hygiene, and bacteriology. He shall further be required to pass an examination in such branches as are necessary to complete the system of which he is a practitioner. If the applicant is a practitioner of any school or system not represented in the membership of the board, the board shall have

the sections in the Revised Statutes corresponding to the sections of the medical law; the revisers also made a few slight verbal changes, such as changing *act* to *chapter*, and changing the section references to refer to the corresponding sections in the Revised Statutes instead. But the revisers were not authorized to make substantial changes in the law (see Title, Revised Statutes, in the Revised Statutes), particularly s. 2,710.

authority to call a regularly licensed practitioner of that system to assist in the examination. An average grade of seventy-five per cent in all branches of the examination shall be required; provided the applicant shall not pass lower than sixty per cent. in any one branch. Said examination shall be conducted by and under the supervision of the secretary of the board, with such assistance from the other members as shall be agreed upon by them. Said examinations (not more than four in any one year) shall be held at stated periods to suit the convenience of the board and applicants (*ib.*, s. 4).

CERTIFICATES.—The president and secretary of the board shall issue certificates to all persons who successfully pass said examinations, and such certificates, after being duly recorded, shall be deemed license to practise medicine in all branches in which the applicant has taken examination in this State (*ib.*, s. 4).

SCHOOL OF PRACTICE.—No application for license to practise medicine in this State shall be rejected because of adherence to a particular school of practice (*ib.*, s. 4).

FORMER PRACTITIONERS.—All persons licensed practitioners in Wyoming prior to the passage of this act shall be exempt from its requirements (*ib.*, s. 4).

APPLICATION is made to the board through its secretary (*ib.*, s. 5).

ADMISSION WITHOUT EXAMINATION.—The board may in its discretion accept and register, upon payment of the registration fee, and without examination of the applicant, any certificate which shall have been issued to him by the medical examining board of the District of Columbia, or of any State or Territory of the United States, provided, however, that the legal requirements of such medical examining board shall have been at the time of issuing such certificate in no degree or particular less than those of Wyoming at the time when such certificate shall be presented for registration to the board created by this act; and provided further that the provisions of this section shall apply only to such of said medical examining boards as accept and register the certificates granted by this board without examination by them of the ones holding such certificates (*ib.*, s. 6).

DEFINITION.—Any person shall be regarded as practising medicine within the meaning of this act who shall in any manner hold himself out to the public as being engaged within this

State in the diagnosis and treatment of diseases or injuries or deformities of human beings; or who shall suggest, recommend, or prescribe any form of treatment for the intended palliation, relief, or cure of any physical or mental ailment of any person with the intention of receiving therefor either directly or indirectly any fee, gift, or compensation whatsoever; or who shall maintain an office for the reception, examination, and treatment of any person suffering from disease or injury of body or mind; or who shall attach the title of M.D., surgeon, doctor, or any other word or abbreviation to his name, indicative that such person is engaged in the practice of medicine as *hereinafter* (*sic*) defined (*ib.*, 7).

Examination Papers.—These are the property of the State, and shall remain in the possession of the board. The questions, answers, and gradings are open to public inspection (*ib.*, s. 8).

Recording.—Holders of certificates as having successfully passed an examination before said board shall have them recorded at the office of the county clerk in the county in which they reside. The date and place of record shall be indorsed thereon. Any person removing to another county to practise shall procure a certificate to that effect from the county clerk (*ib.*, s. 9).

Refusal—Revocation.—The board may refuse certificates to individuals guilty of malpractice or dishonorable conduct, or who shall have been convicted of penal offences before any court in Wyoming or elsewhere; or may revoke certificates for like causes after due notice and trial by the board, subject to appeal to the district court of the county in which said individual resides; but no such revocation shall be made by reason of the individual's belonging to or practising any particular system of medicine (*ib.*, s. 12).

Exceptions.—The act does not prohibit gratuitous service in case of emergency, nor apply to commissioned surgeons of the United States army or navy, or medical examiners of relief departments of railroad companies while so employed, or any lawfully qualified physicians residing in other States or *counties* (*sic*), meeting registered physicians of this State in consultation, or any physician or surgeon residing upon the border of a neighboring State, and duly authorized under the laws thereof to practise medicine and surgery therein, whose practice extends into the limits of this State (*ib.*, s. 13).

APPLICATION OF THE ACT.—The act applies to apothecaries and pharmacists who prescribe for the sick (*ib.*).

OFFENCE—PENALTY.—Practising medicine within the meaning of this chapter without complying with the provisions of this act is a misdemeanor punishable by a fine of from $50 to $300, or imprisonment in the county jail for not more than one year, or both. Filing or attempting to file as his own the diploma of another or a forged affidavit of identification is a felony punishable by imprisonment in the penitentiary for not more than three years (*ib.*, s. 14).

OBSTETRICS—MIDWIFERY.—The board shall examine all persons upon the theory and practice of obstetrics who profess to practise obstetrics and midwifery, who do not have authority to practise medicine or surgery; and they may issue to such candidates and persons who shall pass a satisfactory examination certificates which shall authorize and empower them to practise obstetrics or midwifery. No person shall practise obstetrics or midwifery unless a practising physician or authorized to practise under this act or holding certificate prescribed by this section. This section does not prohibit services in cases of obstetrics or midwifery in cases of emergency (*ib.*, s. 15).

ITINERANT.—Any itinerant who has not qualified as hereinbefore provided, who shall sell or offer for sale any drug, nostrum, or appliance of any kind intended for the treatment of any disease or injury or deformity, or for correction of impairment of vision or hearing, or shall by writing, printing, or other method, except by ordinary professional card or sign, publicly profess to cure or treat disease, injury, or deformity by any drugs, nostrum, or in any manner whatever, shall be guilty of a misdemeanor punishable by a fine of from $50 to $100 and costs of prosecution for each offence, and shall be committed until such fine and costs are paid. Any one who shall maintain an office or residence in the State for a period of not more than three months in any one year shall be deemed an itinerant (*ib.*, s. 16).

FEES.—With each application to the secretary of the board $25. If the applicant fail to pass the examination he may present himself at any time within a period of one year for another examination without the payment of an additional fee (*ib.*, s. 5).

To the county clerk, for recording, the usual fees for making the record (*ib.*, s. 9).

The United Kingdom of Great Britain and Ireland.[1]

Medical Acts.—The Act 21 and 22 Victoria, c. 90 (1858),

[1] Explanatory.—This abstract includes only "the Medical Act," 21 and 22 Vict., c. 90 (1858), and its amendments, and "the Midwives' Act," 2 Edward VII, c. 17; it does not include the Apothecaries Act (55 Geo. III, c. 194), the Anatomy Act (2 and 3 Will. IV., c. 75), the Pharmacy Act (15 and 16 Vict., c. 56), the Dentists Act (41 and 42 Vict., c. 33), the Veterinary Surgeons Act (44 and 45 Vict., c. 62), nor the Medicine Stamp Acts (42 Geo. III., c. 56; 43 Geo. III., c. 73; 44 Geo. III., c. 98; 52 Geo. III., c. 150; 55 Geo. III., c. 184, s. 54; 38 and 39 Vict., c. 23, s. 8). Any one interested in these can find them in Chitty's Statutes, 5th ed., vol. VII. This book—title, Medical Acts, p. 1—makes reference to Glenn's "Laws Affecting Medical Men," ed. 1871, and calls attention to the fact that 3 Hen. VIII., c. 11, by which no person may practise as a physician or surgeon in the city of London or within seven miles of it without having been admitted by the bishop of London or dean of St. Paul's, is still unrepealed, though obsolete.

The decisions under the Apothecaries law, though they may be useful in construing and applying the analogous provisions of *the Medical Act*, have not been abstracted in these footnotes. They can be found in Mew's English Case Law Digest, vol. 9, and its annual supplements, title *Medicine*, subtitle *Apothecaries*, see p. 556, n. 1.

The object of the medical act was stated in its preamble, to enable persons requiring medical aid to distinguish qualified from unqualified practitioners. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H. (1861), 561; see other reports, p. 563.

Early Medical Laws.—At common law when death or injury arose from treatment, there was no distinction, either in civil or criminal proceedings between those who were qualified or regular practitioners and those who were not; the gist would be maltreatment, whether through ignorance or negligence. See note on this subject in 4 F. & F., 521 (Ruddock *v.* Lowe).

The statutes which imposed qualifications in no degree altered the law as to the liability of practitioners for malpractice, though they imposed penalties for practising without qualification, and precluded them from recovering for their charges unless legally qualified; see note on this subject, 4 F. & F., at p. 526 (Jones *v.* Fay).

By 3 Hen. VIII, c. 11, it was provided that no person within London or seven miles of it should exercise as a physician except he be first examined, approved, and admitted by the Bishop of London or by the Dean of St. Paul's calling to them four doctors of physic (Rex *v.* Doctor Askew *et al.* [1768], 4 Burrows, at p. 2197), "and for surgery other expert persons in that faculty." 3 Hen. VIII, c. 11, A.D. 1511.

The act of 3 Hy. VIII, c. 11 (A.D. 1511), also enacted that no person beyond the said seven miles precinct of London should exercise as a physician or surgeon in any diocese unless first approved by the bishop of the diocese, or, in his absence, by his vicar-general; either of them calling to them such expert persons in the said faculties as their discretion should think convenient. The act was not to be prejudicial to the universities of Oxford and Cambridge. It provided that surgeons should be comprised in the act like as physicians, for like mischief of ignorant persons presuming to exercise surgery.

In Gremaire *v.* Le Clerc Bois Valon, 2 Camp., 144 (1809), a French emigrant priest was allowed to recover for a surgical cure of a brother priest, though it did not appear that he was a member of the College of Surgeons, because 3 Hy. VIII, c. 11, contained no prohibitory clause, but merely put a penalty of £5 a month on unlicensed practice. Subsequently, on a rule to show cause why the verdict should not be set aside, the rule was discharged, on the ground that it was not proved that the priest was not a regularly licensed member of the College of Sur-

and the amendments thereof and additions thereto, are generally spoken of as the Medical Acts.

geons (discussed in 77 Miss., 426, see p. 330, n. 2, *supra*).

3 Hen. VIII, c. 11, is still in force so far as it prohibits and imposes a penalty upon any one acting as a surgeon without the qualification required by it. Cotton, L. J., in Davies *v.* Makuna, 54 L. J. (N. S.) Ch., 1148 (1885). Lindley, L. J., doubts it. See other reports, n. 3, p. 565. 55 Geo. III, c. 194, s. 14, will prevent any unqualified person acting as an apothecary.

The insufficiencies of 3 Henry VIII, c. 11, gave rise to the charter of the College of Physicians. Lawrence, J., in King *v.* College of Physicians, 7 Term Rep. (7 Durn. & E.), 282. It was not necessary that all men of the faculty should be members of the college (*ib.*). In this opinion will be found an exposition of the difference between licentiates and members or fellows of the college, and the reasons for it.

The history of the early legislation and the rights and powers of the College of Physicians is set forth and discussed in Krug *v.* President and College, 7 Term Rep. (7 Durn. & E.), 282 (1797). This case denies the right of a licentiate of the college to a mandamus to compel his examination for admission as a member or fellow of the college. The college was entitled to make a by-law that none but a doctor of one of the two universities of England, or that of Dublin, should be admitted to such an examination. This is not superadding a qualification to that required by the charter, but is ascertaining a criterion of fitness; see further on 14 and 15 Henry VIII, p. 560, n. 1.

A discussion of the effect of the prohibition of 14 and 15 Hy. VIII, c. 5, will be found in the opinion of Chambre, J., in Smith *v.* Taylor, 1 Bos. & P. New R., 196.

The act 14 and 15 Hy. VIII, c. 5, was a public and not a private act. Coll. of Physicians *v.* Harrison (1828), M. & M., 191.

Collins *v.* Carnegie, 1 Ad. & E., 695 (1834) (for other reports see p. 556), contains a discussion of the effect and construction of the prohibitions in 3 H. VIII, c. 11, and 14 and 15 H. VIII, c. 5.

The act 32 Hen. VIII., c. 40 (1540), relating to physicians and their privileges, contained a direct recognition by the legislature that the science of physic comprehended, included, and contained the knowledge of surgery as a special member and part thereof, and that the statute granted to the company or fellowship of physicians the privilege of practising such science of physic. Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports see p. 562).

Sec. iii of c. 40, Laws 32 Henry VIII (1540), was as follows: "And forasmuch as the science of physick doth comprehend, include, and contain the Knowledge of Surgery, as a special Member and Part of the same; therefore be it enacted, That any of the said Company or Fellowship of Physicians" (*i.e.*, The President, etc., of the Faculty of Physic in London), "being able, chosen, and admitted by the said President and Fellowship of Physicians, may from time to time, as well within the City of London as elsewhere within this Realm, practise and exercise the said Science of Physick in all and every his Members and Parts; any Act, Statute, or Provision made to the contrary notwithstanding." Secs. I and II of this act conferred certain privileges upon physicians, of exemption from official duties, and upon their representatives to examine apothecaries' wares for defective, corrupt, etc., wares, drugs, and stuffs. Other regulations concerning physicians will be found in 6 Wm. III, c. 4; 18 Geo. II, c. 15.

For legal history of the Royal College of Physicians of London see Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see p. 562). This is the better known name for the corporation which was chartered as the President and College and Commonalty of the Faculty of Physic in London by the charter of 23 Sept., 1518, by Henry VIII (*ib.*).

34 and 35 Hy. VIII, c. 8, 1542–43, "a bill that persons, being no common surgeons, may minister med-

MEDICAL COUNCILS.—There is a general council[1] of medical education and registration of the United Kingdom, with branch councils[2] for England, Scotland, and Ireland (21 and 22 Vict., 1858, c. 90, ss. 3, 6).

Members of the general council are chosen as provided in 49 and 50 Vict., c. 48, s. 7[3]; those representing the medical corporations must be qualified to register under this act[4] (21 and 22 Vict., c. 90, s. 7).

The general council appoints a registrar for England, and the branch councils for Scotland and Ireland appoint respectively a registrar for Scotland and Ireland (*ib.*, ss. 10, 11).

REGISTRAR.—It is the duty[5] of the registrars to keep their

icines notwithstanding the statute" (3 Hy. VIII, c. 11), gave persons, having knowledge and experience of the nature of herbs, roots, and waters, etc., to practise, use, and minister in and to any outward sore, *uncome*, wound, etc., any herbs, ointments, etc., according to their cunning, experience, and knowledge.

This act contains a preamble which severely arraigns the surgeons of London (since 3 Hy. VIII, c. 11), "minding their own lucres," and contrasts them to their discredit with the men and women whom God has endowed with a knowledge of herbs, etc., who have ministered to poor people only for neighborhood and God's sake and of pity and charity, while the surgeons let them perish for lack of help of surgery, practising only where there was hope of reward.

This statute (34 and 35 Hy. VIII, c. 8) is said in Comyn's Digest, title "Physicians," not to extend to those who serve for profit.

It is stated, in the argument of Field, in Rex *v.* Master Warden of Company of Surgeons, 2 Burr., 892 (1759), at p. 896, that the first restriction of the common right that every person has of learning and exercising any art in any place, except where it happens to be restrained by custom, is 5 Eliz., c. 4 ("An Act containing divers orders for Artificers, Laborers, Servants of Husbandry, and Apprentices," which, however, recites in its preamble that there are in force many other acts on the same subjects, which are imperfect and contrary).

For early legislation respecting particular medical and surgical corporations, see *infra*, p. 560, *et seq.*

CONSTRUCTION.—The statute should not be strained beyond its clear words for the purpose of advancing the meaning of the legislature. Haffield *v.* Mackenezie, 10 Ir. C. L., 289.

[1] The first meeting of the General Council was duly held November 23, 1858, at the Hall of the Royal College of Physicians. Queen *v.* Storrar, 2 El. & El., 131 (1859); s. c. 28 L. J. Q. B., 326; 5 Jur. (N. S.), 1304; 7 W. R., 612.

[2] The act shows the superintending power of the General Council over the branch councils. Queen *v.* Steele, 13 Ir. C. L., 398.

[3] The legal history of the University of London is set forth in Queen *v.* Storrar, 2 El. & El., 131 (for other reports of same case see n. 1, *supra*).

Under its charter the Senate of the University of London is the body empowered to choose the member of the Medical Council, in behalf of that university. Queen *v.* Storrar, 2 El. & El., 131 (for other reports of same case see n. 1, *supra*).

[4] Persons representing universities are persons holding of necessity under degrees, but the representatives of medical corporations do not hold under degrees; they hold by their licenses. Queen *v.* Steele, 13 Ir. Com. L., 398.

[5] The registrars are first bound to act in accordance with the provisions of the act and also to act under orders and regulations of the General Council. Queen *v.* Steele, 13 Ir. C. L., 398.

registers correct, and to erase the names of all registered persons who shall have died, and from time to time to make the necessary alterations in the addresses or qualifications of persons registered. It is lawful for the registrar to write a letter to any registered person, addressed to him according to his address on the register, to inquire whether he has ceased to practise or has changed his residence, and if no answer be returned within six months from the time of sending the letter, it is lawful to erase the name of such person from the register, but it may be restored by direction of the general council (*ib.*, s. 14).

QUALIFICATION.—Persons possessed of one or more of the qualifications[1] described in Schedule A, on the payment of a fee not exceeding £5, are entitled[2] to register on the production[3] to the registrar of the branch council for England, Scotland, or Ireland of the document[4] conferring or evidencing the qualification[5] in respect whereof he seeks to be registered, or upon transmitting by post to such registrar information of his name and address, and evidence[6] of his qualifications and of the time or times at which they were obtained. The several colleges and bodies mentioned

[1] Certificates from persons not authorized to give qualifications in the United Kingdom do not make the recipient capable of acting as a surgeon in England. Cotton, L. J., in Davies *v.* Makuna, 54 L. J. (N. S.) Ch., 1148; see other reports, n. 3, p. 565.

[2] It is not made imperative on any medical person to be registered under the act; he shall be *entitled* to be registered, as provided in the act. Queen *v.* Steele, 13 Ir. C. L., 398.

[3] Under sec. 15, it is upon the production of the diploma that the applicant is entitled to be registered, and the Medical Council could raise no question as to where, when, or in what the applicant has been examined; but under secs. 20 and 21, if the council thought that the course of study and examination was not sufficient, it could only make representation thereof to the Privy Council who might suspend the right of registration if it thought fit. So matters continued till 1886: the Medical Council could not refuse to register if the requisite diploma were produced But in 1886 it was enacted that no person should be registered with respect to any qualification unless he had passed a qualifying examination as above (see text). Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see n. 562).

[4] Diplomas conferring degrees and honors do not pass to the provisional assignee by the vesting order of the Insolvent Debtor's Court under 1 and 2 Vict., c. 110, s. 37; they may be of value to the person named in them, but they have no value in the hands of the assignee. Kernot *v.* Cattlin, 2 El & Bl., 790 (1853).

[5] Lord Mansfield in Rex *v.* Doctor Askew *et al.* (1768), 4 Burrows, at p. 2197, shows that in 1561 a partial license was granted to an oculist, and that licenses had been granted to women, instancing "Mrs. Stevens's medicine for the stone"; he states that a person may be fit to practise in one branch who is not fit to practise in another; that partial licenses had been given for above two hundred years, though lately general licenses had been usual.

[6] The registrars must be satisfied by proper evidence of the qualification *as contained in the document* produced to them. Queen *v.* Steele, 13 Ir. C. L., 398.

in Schedule A may transmit from time to time to the registrar, under their respective seals, lists of the persons who by grant of such colleges and bodies respectively are for the time being entitled to register,[1] stating the qualifications[2] and residences of such persons, and it shall be lawful for the registrar on the payment of the said fee to enter in the register the persons mentioned in such lists with their qualifications[3] and places of residences as therein stated without other application[4] (*ib.*, s. 15).

The general council is required to make orders for regulating the registers from time to time[5] (*ib.*, s. 16).

Persons actually practising medicine in England before August 1st, 1815, were entitled to register under the act[6] (*ib.*, s. 17).

Any two or more of the colleges and bodies in the United Kingdom mentioned in Schedule A may, with the sanction and under the direction of the general council, unite or co-operate in conducting the examinations[7] required for qualifications to be registered (*ib.*, s. 19, 37 and 38 Vict., c. 34).

[1] See n. 5, p. 544.

[2] There is a marked distinction between a *doctor or bachelor of medicine*, which is a degree, and a *licentiate*, because although medical corporations cannot grant a degree by which a party can be entitled to be entered in the register under his diploma as a *doctor of medicine*, they may give a license which entitles to registration as a licentiate of medicine. Queen *v.* Steele, 13 Ir. C. L., 398.

[3] Nothing titular is now entitled to be admitted by the registrar. Queen *v.* Steele, 13 Ir. C. L., 398 (1861).

A licentiate of the King's and Queen's College of Ireland, though addressed by popular courtesy as *doctor*, is not entitled to have this title entered on the register. Queen *v.* Steele, 13 Ir. C. L., 398.

The document produced to the registrar must contain a qualification conformable to some one of the qualifications mentioned in the schedule. Queen *v.* Steele, 13 Ir. C. L., 398.

A person who has a diploma of license from the King's and Queen's College of Physicians of Ireland is not entitled to be registered as M.D. Queen *v.* Steele, 13 Ir. C. L., 398.

Although the Irish acts, 1 G. III, c. 14, and 40 G. III, c. 84, treated licentiates of the King's and Queen's College of Physicians of Ireland, along with Doctors of Medicine, as physicians, they are not entitled to be classed as doctors of medicine under the Medical act; they are all physicians, that is the name of the genus, but it decides nothing as to the species. Queen *v.* Steele, 13 Ir. C. L., 398.

The provision of the original act that titles should be registered was repealed by 22 Vic., c. 21. Queen *v.* Steele, 13 Ir. C. L., 398.

It is not a true description of a licentiate of the Society of Apothecaries (even after 1886) to describe himself as a physician. Hunter *v.* Clare, L. J. (N. S.) 68 Q. B., 278; see other reports, p. 566.

[4] Secs. 26, 29, 39, apply to every registration, whether under sec. 15, sec. 17, or sec. 46. Regina *v.* Gen. Coun., 3 El. & El., 523; see other reports, n. 2, p. 548.

Sec. 15 gives an absolute right. Regina *v.* Gen. Coun., 3 El. & El., 523; see other reports, p. 548.

[5] Court, register, and council are bound by the provisions of the act. Queen *v.* Steele, 13 Ir. C. L., 398.

[6] See n. 4, *supra*.

[7] For a statement of the method of the conduct of examinations by the Royal College of Physicians in London, independently and also conjointly with the Royal College of

The privy council may suspend the right of registration in respect of qualifications granted by any college or body[1] (*ib.*, s. 21).

After such revocation, no person shall be entitled to register in respect to any qualification granted by such college before revocation[2] (*ib.*, s. 22).

The privy council may issue an injunction directing any body entitled to grant qualifications to desist from imposing upon any candidate for examination an obligation to adopt or refrain from adopting the practice of any particular theory of medicine or surgery as a test or condition of admitting him to examination or granting him a certificate; and in the event of their not complying, may order that such body cease to have the power of conferring a right to be registered so long as they shall continue such practice (*ib.*, s. 23).

Where any person entitled to be registered applies to the registrar of any branch council for that purpose, such registrar is required forthwith to enter in a local register the name and place of residence, and the qualifications[3] in respect of which the person is so entitled and the date of registration; and in case of the branch council for Scotland or Ireland, to send to the registrar of the general council a copy of the entry, and the registrar of the general council is required to cause the same to be entered in the general register; and such registrar is required to cause all entries made in the local register for England to be entered in the general register (*ib.*, s. 25).

No qualification is entered on the register, on the first registration or by way of addition to a regular name, unless the registrar be satisfied by proper evidence that the person claiming it is entitled to it.[4] Any appeal from the decision of the registrar may be decided by the general council or by the council for England, Scotland, or Ireland, as the case may be. Any entry

Surgeons of England, see Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see p. 562).

[1] If a medical school or college should degenerate, it may be debarred the privilege of sending its members for registration (s. 26). Queen *v.* Steele, 13 Ir. C. L., 398.

Sec. 20 secures a sufficiently high standard of education. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561; see other reports, p. 563. The colleges may abrogate the restrictions of their by-laws without interference from the medical act, and if the abrogation lowers the standard of education, the remedy is found in sec. 20 (*ib.*).

[2] See n. 3, p. 545.

[3] See n. 5, p. 545.

[4] See n. 6, p. 545.

proved to the satisfaction of such general council or branch council [1] to have been fraudulently or incorrectly made may be erased [2] from the register by an order in writing of such general council or branch council (*ib.*, s. 26).

Medical Register.—The registrar of the general council is required to cause to be printed, published, and sold under the direction of such council, every year, a correct register of the names with the respective residences and medical titles, diplomas, and qualifications [3] conferred by any corporation or university or by a doctorate of the Archbishop of Canterbury, with the dates thereof, of all persons appearing on the general register as existing on January 1st in every year. Such register is called the *Medical Register*, and a copy of the *Medical Register* for the time being is evidence that the persons therein specified are registered according to the act, and the absence of the name of any person from such copy is evidence, until the contrary be made to appear, that such person is not so registered; provided, that in the case of any person whose name does not appear in such copy, a certified copy under the hand of the registrar of the general council or a branch council of the entry of the name of such person on the general or local register shall be evidence that such person is so registered (*ib.*, s. 27).

If any college or body exercise any power it possess of striking off from its list the name of any one of its members, it shall signify his name to the general council, and the said council may, if they see fit, direct the registrar to erase from the register

[1] A branch council may make an order to erase an entry fraudulently or incorrectly made. Queen *v.* Steele, 13 Ir. C. L., 398.

[2] The act is imperative: if the document produced does not comply with the act the name shall be erased; where the fact cannot be varied by evidence *dehors* the record, the person whose name is erased is not entitled to notice. Queen *v.* Steele, 13 Ir. C. L., 398, distinguishing Queen *v.* Registrar, 3 L. T. N. S., 692.

A mandamus will not be granted to restore a qualification to the register, which was erased without notice, where it appears that, when restored, it can be immediately erased, upon notice. Queen *v.* Steele, 13 Ir. C. L., 398.

The revocation of a diploma of a *dentist* does not render him liable to be erased from the dentists' register. *Ex parte* Partridge, L. R. 19 Q. B. D., 467 (1887) (the diploma had been cancelled on account of its holder advertising for business). The (dental) council is not bound by the act of the medical college, nor entitled to erase on the ground of its action (*ib.*). It can only erase for the causes specified in the act (*ib.*). Other reports of this case are 36 W. R., 442, affirming 56 L. J. Q. B., 609; 52 J. P., 40.

The erasure (sec. 26) may be made on the application of a third party. Regina *v.* General Council, 3 El. & El., 523 (1861); 30 L. J. Q. B., 201; 7 Jur. N. S., 798; 3 L. T. (N. S.), 692; 9 W. R., 413. See n. 4, p. 546.

[3] See n. 5, p. 545.

the qualification derived from such college or body in respect of which such member was registered, and the registrar shall note the same therein; but the name of no person shall be erased from the register on the ground of his having adopted any theory of medicine or surgery (*ib.*, s. 28).

If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or shall be after due inquiry[1] judged by the general council[2] to have been guilty of infamous conduct in any professional respect,[3] the general council may, if they see fit,

[1] The council is not a private association; it is a public corporation. There is no appeal from its decision; the influence of public opinion is a safeguard against the abuse of its powers. This influence cannot act if it keeps secret the grounds of its action; the public is interested in knowing them. Many provisions of the act (enumerated by the court) show that the public should have accurate information as to the proceedings of the council. Therefore a fair, honest, and accurate report of the proceedings of the council, published by it, is privileged. And while there is no judicial precedent to this effect, the rule of privilege is applicable, and the council is not liable in damages to a physician whose name it has ordered erased for infamous conduct in a professional respect, for publishing such an account of its proceedings. Allbutt *v.* Gen. Med. Coun., 58 L. J. R. (N. S.) Q. B. (1889) (citing Burrows *v.* Bell. 7 Gray, Mass., 301) (see, for other reports of this case, n. 3, *infra*).

The publication might be evidence of express malice (*ib.*).

A letter notifying an accused phyphysician that his case would be considered on a day named, and asking him to submit a written defence, or attend in person, or both, is sufficient notice. Partridge *v.* Gen. Coun., 57 J. P., 4.

A person cannot be both accuser and judge. Partridge *v.* Gen. Coun., 57 J. P., 4.

The medical council cannot take evidence under oath. Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

The General Medical Council, in sitting on complaints, acts judicially. Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

There must be an adjudication by the council of infamous conduct in some professional respect, arrived at after due inquiry, the accused must have notice of what he is accused and an opportunity of being heard, and the conclusion must be honestly arrived at; the particulars brought to his attention should be particulars of conduct which, if established, is capable of being viewed by honest persons as conduct which is infamous. Leeson *v.* Gen. Med. Coun , L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

The council might proceed *mero motu*. Fry, L. J., in Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

[2] Where a prosecution before the General Medical Council was conducted by a medical union, through its council, and two of the members of the General Medical Council were subscribers to the union, but not members of its council, they were not disqualified to sit in judgment (Fry, L. J., dissented). Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

The only thing which the courts can investigate is whether the General Medical Council have acted honestly within their jurisdiction. Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

[3] In Allbutt *v.* Gen. Med. Council, 58 L. J. R. (N. S.) Q. B. (1889), it ap-

direct the registrar to erase the name of such medical practitioner from the register[1] (*ib.*, s. 29).

peared that the General Medical Council had, after due inquiry, adjudged it to be "infamous conduct in a professional respect" for a registered medical practitioner to publish and publicly cause to be sold a work entitled *The Wife's Handbook*, at so low a price as to bring the work within reach of the youth of both sexes, to the detriment of public morals. The Court of Appeal held that the council had jurisdiction to enter upon the inquiry, and were constituted by law the sole judges whether the complaint was substantiated, and that the Court of Appeal had no power to review their decision, where the accused had every opportunity of bringing his case before the council, who heard his counsel and his evidence and adjudicated thereon; citing with approval Ex parte La Mert, 4 B. & S., 582 (see other reports of this case in 23 Q. B. D., 400; 61 L. T., 585; 37 W. R., 771; 54 J. P., 36).

The decision of the council cannot be reviewed directly, nor should it be reviewed indirectly in an action for damages for libel in their publishing a fair, true, impartial, *bona fide*, and accurate report of their proceedings. Allbutt *v.* Gen. Med. Coun., 58 L. J. R. (N. S.) Q. B. (1889) (for other reports of this case see *supra*).

If there were no evidence on which the council might fairly and reasonably say that the plaintiff had been guilty of infamous conduct in a professional respect, they went beyond their jurisdiction in erasing a name for that cause. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S.), 534; see other reports, p. 551.

If a medical man in the pursuit of his profession has done something with regard to it which will be reasonably regarded as disgraceful or dishonorable to his professional brethren of good repute and competency, then it is open to the General Medical Council, if that be shown, to say that he has been guilty of infamous conduct in a professional respect. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S), 534; see other reports, p. 551.

Unless infamous conduct is done in a professional respect, it does not come within sec. 29. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S.), 534; see other reports, p. 551.

One who defames his professional brethren, to induce by that defamation suffering people to avoid them and come to him, in order that he may obtain remuneration which he would not otherwise obtain, may properly be adjudged guilty of infamous conduct in a professional respect by the council. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S)., 534; see other reports, p. 551.

It is also evidence of infamous conduct in a professional respect that the accused, by advising his patients to consult an anti-vaccination society, indirectly advised them to violate the law. (By Lopes, L. J.) in Allinson *v.* Gen. Med. Coun., L.J. 63 Q. B. (N. S.), 534; see other reports, p. 551.

Where a *dentist* on obtaining his diploma had promised not to advertise, his advertising after a warning from his college is sufficient evidence of disgraceful conduct in a professional respect to give the council jurisdiction to erase his name therefor, and a mandamus to restore it will be refused. Partridge *v.* Gen. Coun., 57 J. P., 4.

On form of charge of infamous conduct in a professional respect see Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; see other reports, n. 1, p. 569.

Sec. 29 makes the Medical Council the sole judges whether a medical practitioner on the register has been guilty of infamous conduct in any professional respect; the legislature has left the matter to their arbitrament, and the courts cannot interfere. Ex parte La Mert, 4 B. & S., 581 (1863); 33 L. J. Q. B., 69; 9 L. T., 410; 12 W. R., 201. (So held, where the conduct complained of was publishing an indecent and unprofessional treatise, and falsely representing that it was the joint work of the accused and another.)

The council are the sole judges if there is evidence on which they can reasonably act. Partridge *v.* Gen. Coun., 57 J. P., 4.

[1] The medical man whose name is

Every person registered who may have obtained any higher degree or other qualification is entitled to have it inserted in the register in substitution for or in addition to his qualification previously registered, on the payment of such fee as the council may appoint (*ib.*, s. 30).

COMPENSATION.[1]—No person is entitled to receive for any

erased is not disqualified from practising. Allbutt *v.* Gen. Med. Coun., 58 L. J. R. (N. S.) Q. B. (1889) (for other reports of this case see n. 3, p. 549).

Under sec. 29 medical practitioners are not amenable to the council till registered, but if registered when convicted or adjudged guilty of infamous unprofessional conduct, it is immaterial when the offence was committed. Regina *v.* Gen. Coun., 3 El. & El., 523, see n. 2, p. 548.

The council has a right to refuse to hear counsel. *Ib.*

No action is maintainable against the general council for erasing a name from the dentists' register (under the dentists' act) in the absence of malice, though their discretion were erroneously exercised. Partridge *v.* Gen. Coun., L. J. 59 Q. B. (N. S.), 475; 25 Q. B. D., 90; 62 L. T., 787; 38 W. R., 729; 55 J. P., 4.

It cannot, in substance and fact, be adjudged that a member of the general medical council is biassed because he was *ex officio*, as vice-president of a medical union, a member of its committee which brought charges of infamous conduct against a registered physician on whom he sat in judgment, when he had resigned as vice-president and member of the union immediately upon his election to the council, and had never sat on the committee nor taken part in its acts or deliberations, though by the rules of the union his resignation did not take effect until after the hearing before the council of the accused physician. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S.), 534; 1 Q. B., 750; 9 R., 217; 70 L. T., 471; 42 W. R., 289; 58 J. P., 542.

If there is any evidence upon which the council might have properly reached their conclusion, their decision is final. Allinson *v.* Gen. Med. Coun., L. J. 63 Q. B. (N. S.), 534; see other reports, *supra*.

The General Medical Council is not a court, and no rules are binding on them; fault cannot be found with them unless you can show that what they have done is contrary to natural justice. Partridge *v.* Gen. Coun., 57 J. P., 4.

[1] OPERATION OF THE ACT.—The 31st sec. means every person according to his qualification. It now covers physicians, surgeons, and apothecaries. Bramwell, B., in Gibbon *v.* Budd, 2 H. & C., 92 (1863); see other reports, *infra*.

The medical act was only intended to act prospectively. It did not prevent a person not registered under it from recovering after its passage for medical or surgical advice given or medicine supplied before the act came into operation. Wright *v.* Greenroyd, 1 B. & S., 757 (1861); 31 L. J. Q. B., 4; 8 Jur. (N. S.), 98; 5 L. T., 347; Thistleton *v.* Frewer, 31 L. J. Exch., 230.

The amendment of s. 32 by Act 23 and 24 Vict., c. 7, fixing January 1, 1861 (instead of July 1st, 1859), prevented the act from applying to an action instituted before January 1, 1861, though the trial took place afterward. Thistleton *v.* Frewer, 31 L. J. Ex., 230.

In De La Rosa *v.* Prieto, 16 C. B. (N. S.), 578; 33 L. J. C. P., 262; 10 Jur. (N. S.), 851; 10 L. T., 757; 12 W. R., 1029, the plaintiff was a Spaniard, who had obtained a diploma at Montpelier and had been practising for several years in England; the defendant was chief medical officer of a Peruvian frigate lying in the Thames. The defendant, wishing to go to Paris, engaged the plaintiff in his absence for a stipulated compensation to attend defendant's patients (crew and troops) on the frigate and a transport lying near, and others at houses on the shore; the plaintiff sued the defendant for the stipulated compensation, less something which had been paid on account. It was *held* that secs. 31 and 32 applied to

medical or surgical advice, or attendance, or for the performance of any operation or for any medicine which he shall have

contracts between medical men as well as between medical men and their patients; that they had no application in the case of an unregistered assistant suing a registered practitioner for his salary, but to an action brought either against the patients or any one who is to pay for medical attendance or medicine prescribed and supplied to them. It was also said that they would apply to a guaranty of payment by the patient for medicines furnished by an unregistered practitioner, or to medicines furnished to the poor of a parish on the credit of overseers of the parish or guardians of the union; in all of these cases the statute would be a defence. To the proposition that the Peruvian law applied, the court answered that one of the parties was domiciled in England and there subject to a personal disqualification, that the contract was to be performed partly on shore, and that the English law applied to the contract, and that the law of the *forum* as to what should be proved at the trial (registration) also applied as governing the remedy.

There may possibly be cases in which a properly qualified person being at hand, and really directing the attendances and prescribing the medicines, can recover though he has not seen the patient; the unqualified person may, under circumstances, be the hand employed by the directing brain of the qualified person. But, however this may be, a registered practitioner cannot recover for medical attendance which he did not render, but which was rendered by his partner, an unregistered person. Howarth *v.* Brearley, 56 L. J. (N. S.) Q. B., 543; 19 Q. B. D., 303; 56 L. T., 743; 36 W. R., 302; 51 J. P., 440.

Where a qualified medical practitioner sues for services rendered and medicines supplied, it is not a compliance with s. 32 to show that they were rendered or supplied by another; he cannot give a roving commission to another (in this case an unqualified person), and then sue the patient. The principles of master and servant do not apply in this case. Howarth *v.* Brearley, 56 L. J. (N. S.) Q. B., 543; see other reports, *supra.*

This is a disqualifying statute and is to be construed strictly. Byles, J., in Turner *v.* Reynall, 14 C. B. (N. S.), 328; see other reports, n. p. 555.

In Leman *v.* Houseley, 44 L. J. (N. S.) Q. B., 22, it was indicated that this law did not intend that a person should qualify subsequent to the rendition of services and then recover, although in that case the plaintiff was disqualified by a prohibitory provision of the Apothecaries' Act, which was unrepealed and which prohibited practice as well as recovery without previous qualification.

Physicians.—The distinction between the public policy involved in the disqualification of barristers to recover compensation by suit and the disqualification of physicians is pointed out in argument in Chorley *v.* Bolcot, 4 Term R. (4 Durn. & E.), 317 (1791).

In Chorley *v.* Bolcot, 4 Term R. (4 Durn. & E.), 317 (1791); 2 R. R., 395, a verdict for his fees, obtained by a physician, was set aside by Lord Kenyon on the ground that the fees of a physician were honorary and not demandable as of right. But see Gibbon *v.* Budd, *infra,* and Veitch *v.* Russell, *infra.*

In Veitch *v.* Russell (1842), 3 G. & D., 198, it was said that it was the general understanding that physicians perform their professional services without any title to remuneration; in order to take a case out of that understanding, the physician must show an express contract; and a subsequent promise to pay the *account* as a *debt* does not constitute a contract nor sufficient evidence of a contract to entitle the physician to recover; money paid by a physician in such a case for his journeys is to his own use and not to the use of a patient. See also s. c., Car. & M., 362 (at nisi prius); 3 Q. B., 928; 12 L. J. Q. B., 13; 7 Jur., 60.

In Little *v.* Oldaker (1842), Car. & M., 370, Denman, C. J., stated that while a physician could not sue for his fees as a physician, he did not forfeit his right to sue for compensation for anything he had done

other than as a physician (*e.g.*, as a surgeon), provided he could prove it; and where he might have acted either as physician or surgeon, the fact that he was not paid at the time of his consultation went to show that he was not acting as a physician.

In Shalleross *v.* Wright, 12 Beav., 558 (1850); 19 L. J. Ch., 443; 14 Jur., 1037, the Master of the Rolls refused to allow an executor for a payment made to a physician who had attended the testator in expectation of a legacy, the testator having promised to pay him for his services or leave him an equivalent. The Master of the Rolls denied that this was a contract.

In Packman *v.* Vivian, 24 Beav., 290, the evidence of a contract with a physician being insufficient, recovery from the personal representative of a deceased patient was denied.

Though by reason of the general custom of physicians not to charge it has been held that they could not sustain an action for their services (the patient having dealt on the faith of the general custom), they can by special contract charge. Wood, V.C., in Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns and H. (1861), 561; see other reports, p. 563.

Since the passage of the medical act the presumption is not, as formerly, that a physician attends a patient for an honorarium, but for a fee; he can recover the same without an express contract. Gibbon *v.* Budd, 2 H. & C., 92 (1863); 32 L. J. Ex., 182; 9 Jur. N. S., 525; 8 L. T., 321; 11 W. R., 626.

A physician registered under the medical act is (sec. 31), in the absence of a distinct understanding to the contrary, entitled to be paid for professional practice if not restrained by a by-law of the College of Physicians. Gibbon *v.* Budd, 2 H. & C., 92 (1863); see other reports, *supra*.

The state of the law prior to the medical act was that a physician might bargain with his patient for a compensation in money; it was not the conventional practice to receive this as a right; no inference could be drawn from attendance that there was any contract for payment (citing Veitch *v.* Russell, 43 E. C. L. R. 3 Q. B., 928). Now, if he can satisfy the jury that both parties understood that he was to be paid, he is entitled to recover. Martin, B., in Gibbon *v.* Budd, 2 H. & C., 92 (1863); see other reports, *supra*.

The former presumption as to the relation between physician and patient (with respect to compensation) ceased with the Medical Act of 1858 (sec. 31), and a physician when registered is, as to remuneration for his services, in the same situation as any other person. Bramwell, B., in Gibbon *v.* Budd, 2 H. & C., 92 (1863); see other reports, *supra*.

It is competent for a physician if he pleases to attend a patient without being entitled to remuneration. Martin, B., in Gibbon *v.* Budd, 2 H. & C., 92 (1863); see other reports, *supra*.

Surgeons.—In 1854 there was nothing to prevent any person from practising as a surgeon in any place not within a diocese, and not in London or within seven miles thereof. If a plea alleging want of a license was interposed in an action by a surgeon to recover for his services, the plea must negative the exception. Martin, B., in D'Allax *v.* Jones, 26 L. J. (N. S.) Exch., 79; 2 Jur. (N. S.), 979.

In a note to Lipscombe *v.* Holmes, 2 Camp., 441 (1810), will be found citations illustrating the difference between the liability of a barrister and a surgeon, as bearing on their respective rights to recover compensation.

The imposition of a penalty (for practising as a surgeon without a license) does not necessarily render an act void or illegal (so said of his right to recover for his services). The intention of the legislature must be looked to (citing Cope *v.* Rowlands, 2 Mel. & W., 149; 6 L. J. [N. S.] Exch., 63). Martin, B., in D'Allax *v.* Jones, 26 L. J. [N. S.] Exch., 79 (1854); 2 Jur. (N. S.) 979.

In Little *v.* Oldaker (1842), Car. & M., 370, in a note, will be found discussed the right of a surgeon to recover, and the rules of pleading with respect to the same, as well as the history of the legislation and the leading decisions respecting the practice of medicine and surgery bearing on the right of compensation

If a person attends as surgeon, the Apothecaries' Act does not take away his power to recover for his at-

tendance as such because he also dispensed medicines. He might dispense medicines as an incident to his business in the course of attending a patient as a surgeon. A man licensed by the College of Surgeons may practise as a surgeon without a certificate from Apothecaries' Hall. Simpson *v.* Ralfe (1834), 4 Tyrwh., 325.

A surgeon is entitled to recover for medicines administered ancillary to a surgical case, but not in a case of typhus fever, which is the province of the physician or apothecary. The business of a surgeon is with external ailments and injuries of the limbs. In a case of that description he may perhaps prescribe and dispense medicine. Allison *v.* Hayden (1828), 4 Bing., 619; 1 M. & P., 588; 3 C. & P., 246; 6 L. J. (O. S.) C. P., 144; 29 R. R., 653.

A surgeon cannot recover for his attendance in a typhus-fever case. Gaselee, J., in Allison *v.* Hayden, 4 Bing., 622 (1828); see other reports, *supra*.

A mere expectation of a legacy, there being no contract therefor, will not disentitle a surgeon to recover for his attendance and medicines. The ordinary presumption is that services are rendered in expectation of remuneration, unless the contrary is proved. The right of action is not defeated merely because the surgeon forbore to demand or sue, in expectation of a legacy. Baxter *v.* Gray, 4 Scott N. R., 374 (cited 89 App. Div., N. Y., 400); 3 M. & G., 771; 11 L. J. C. P., 63.

A registered surgeon is not precluded from recovering for services rendered before his registration. There is no provision in 21 and 22 Vict., c. 90, which in terms prohibits an unregistered surgeon from practising or from recovering fees for professional services rendered before registry. Proof of registry at the time of trial is sufficient under sec. 32. Hatfield *v.* Mackenzie, 10 Ir. C. L., 289; distinguished and criticised in 44 L. J. Q. B., 22; 14 C. B. (N. S.), 328.

Cooper *v.* Phillips, 4 C. & P., 581, illustrates the liability of a father and master for the services of a surgeon; *held*, that a master was not liable for services to his servant by one who was not the regular medical man of the family, and the evidence did not show that he attended by the desire of the master or his wife; that the father was liable for the services to his child, though it was not at his house, but elsewhere in the charge of the servant, and though the injury which called for the service was caused by the carelessness of the servant; that the master was liable for the service to his servant living apart from him, where he himself sent another surgeon, but his wife knew that the plaintiff acted as surgeon and made no objection, she being in general superintendence of his house.

Physician and Surgeon.—In Battersby *v.* Lawrence, Car. & M. (1841), 277, where a person had acted both as physician and surgeon, the jury was instructed that a physician could not maintain an action for his services, but they were allowed to find the value of his services as surgeon. It was intimated that, on account of his double capacity, he could not recover, even as surgeon; but, after a verdict in favor of the surgeon, the court refused to grant a new trial.

Where a person assumed the title of physician, doctor, and M. D., he could not sue for his services, though without a diploma, for he assumed the title *cum onere;* but where it appeared that he was a surgeon, he was entitled to sue for services. Lipscombe *v.* Holmes, 2 Camp., 441 (1810).

Apothecaries.—The medical act does not repeal the Apothecaries' Act (55 Geo. 3, 194), but sec. 31 takes a case out of the Apothecaries' Act so far as it applies. Where the qualification is to practise medicine, he is at liberty to recover for medicines not connected with surgery: but where not so qualified, he is not within the new act, and the former disability (s. 21, Apothecaries' Act, no recovery for medicines without a certificate from the Society of Apothecaries) remains. Sec. 32 is a disabling section. It is proper that one should not be qualified to practise in one department of medicine, merely because he has passed an examination in another. A surgeon, not qualified as an apothecary, could not (after 55 Geo. 3, 194) recover for medicines for an internal disease not requiring surgical treatment, though he could recover for medi-

both prescribed and supplied,[1] unless he prove upon the trial[2] that

cines administered for the purpose of removing a complaint which it is within the province of a surgeon to attend and cure. Leman *v.* Fletcher, L. J. R. (N. S.) 42 Q. B., 214; L. R. 8 Q. B., 319; 28 L. T., 499; 21 W. R., 38.

See Leman *v.* Houseley, 44 L. J. (N. S.) Q. B., 22, for a discussion of the rights of apothecaries to practise and to recover.

Surgeon and Apothecary.—A bankrupt surgeon and apothecary, who carries on his business, after his bankruptcy, with his original and new stock of goods obtained on credit, cannot recover as for personal services, though he attends and furnishes necessary medicines. It is carrying on business for profit, and his assignees are entitled. Elliott *v.* Clayton (1851), 16 Ad. & E. (N. S.), 581; 20 L J. Q. B., 217; 15 Jur., 293.

Chemist.—A chemist can only recover for medicines sold, not for advice or attendance; a surgeon cannot charge for his attendance, or for administering medicine, except in cases in his own department. Allison *v.* Hayden, 4 Bing. (1828), 622; see other reports, *supra*, p. 554.

Dentist.—Under the Dental Act a person not registered is not prevented from recovering for a set of false teeth supplied, as distinguished from filling them. Henman *v.* Duckworth, L.T., 90, 546; 20 T. L. R., 436.

Galvanist.—In Thistleton *v.* Frewer, 31 L. J. Exch., 230, a question was raised whether a "mechanical operative galvanist" was within the terms of the act. Martin, B., expressed his opinion that he was, except that the action for the services was instituted before the date fixed for sec. 32 to go into effect under Act 23 and 24 Vict., 7.

Partnerships.—In Turner *v.* Reynall, 14 C. B. (N. S.), 328; 32 L. J. C. P., 164; 9 Jur. (N. S.), 1,077; 8 L. T., 281; 11 W. R., 700 (1863), it was held that where a registered surgeon and apothecary formed a partnership with a registered surgeon, both could sue jointly for attendance and medicine supplied in both capacities; it was also indicated that a person could recover who was registered at any time before the trial though after the institution of the action; and Erle, C.J., intimated that, owing to the preamble to the act "to enable persons requiring medical aid to distinguish between qualified and unqualified practitioners," it would be sufficient if one member of the firm was registered. *Contra*, on this last proposition, Howarth *v.* Brearley, *supra*, p. 552.

There is nothing in the statute prohibiting two persons differently qualified under the statute (*e.g.*, a surgeon and an apothecary) agreeing with a patient that one shall attend him as surgeon, the other as apothecary, and that they shall be remunerated jointly. Welles, J., in Turner *v.* Reynall, 14 C. B. (N. S.), 328; see other reports, *supra*.

If there is any conflict between Turner *v.* Reynall (14 Com. B., N. S., 328) and Leman *v.* Houseley (44 L. J. Q. B., 22), the latter prevails. Howarth *v.* Brearley, 56 L. J. (N. S.) Q. B., 543; for other reports see p. 552.

[1] Some observations of Holt, C. J., in Groenvelt *v.* Burwell, 1 Ld. Raymd., at p. 471 (A.D. 1699), are as follows: "The judges do not understand medicine sufficiently to make a judgment whether they are sound or not," holding that a pleading was certain enough which averred generally that drugs administered were unsound and noxious drugs. Also "if a splenetick person comes to a physician, when in fact he is well, it would be a fault in the doctor to administer physick to him."

[2] In Smith *v.* Taylor, 1 Bos. & P. New R., p. 196 (1805), a person claiming to be a physician sued another for slander; he had practised for several years as a physician; the judges disagreed as to whether to sustain his allegation that he was a physician he must produce a diploma or other direct evidence that he had taken a degree in physic. See Gremaire *v.* Le Clerc, n. 1, p. 542.

In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1905), Mansfield, C.J., in an action for slander of a physician by an apothecary, deemed it sufficient *prima facie* evidence that a person was a lawfully authorized

he is registered under this act (*ib.*, s. 32, as amended 23 and 24 Vict., c. 7, s. 3).

DEFINITION.[1]—The words "legally qualified medical practi-

doctor of physic, that he had practised physic for many years and his right had never been impeached or doubted; and that the apothecary had recognized him as such by putting up his prescription; though he said, if the abuse had related to the plaintiff's want of qualification, then he should prove his qualification.

In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1805), Heath, J., thought that where in the transaction out of which the action grew the defendant had recognized the plaintiff as a physician, it was not necessary for him to prove that he was a duly authorized physician. But the judges disagreed.

In 1834, in Collins *v.* Carnegie, 1 Ad. & El., 695 (other reports, 3 L. J., K. B., 196; 3 N. & M., 703), it was held (in a slander suit, brought by one who alleged that he was a physician) that where the declaration alleged that the plaintiff had been and was a physician, and exercised the profession in England, the plaintiff must prove that he was entitled to practise as a physician in England, and that such proof was not furnished by showing the fact that he had so practised, nor by showing that he had received the degree of Doctor of Medicine from a Scotch university. This case also contains a discussion of the method of proving the genuineness of the diploma; the evidence (which consisted in part of identifying the seal as a facsimile of a seal which a person at the university, calling himself librarian, had produced and stated to be the seal of the university) was held sufficient on this point.

In Moises *v.* Thornton, 8 Durn. & East Term Rep., 303 (3 Esp., 4), the method of proving a diploma, in an action for slander of a physician, is discussed. Grose, J., said that to make a piece of parchment, with a seal affixed to it, evidence, it should either be the original act of the corporation conferring the degree or an examined copy; if an original act, the seal must be proved; if a copy, it should have been compared with the original book by the witness who produced it.

In the same case it was held that where, in the declaration, the plaintiff alleged that he had duly taken the degree of doctor of physic, he must prove that fact by formal proof.

"In manner aforesaid" (s. 31) would seem to cover both advice and medicine. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561 (1861); see other reports, p. 563.

It is possible that the construction of the provision for recovery may be governed by the maxim *reddendo singula singulis*, and that the right of recovery is only according to the qualification of the individual, viz., according as he is an apothecary, for his services as an apothecary; and similarly a physician, for his services as a physician; a surgeon, as a surgeon; and not the one according to the rights of the other. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561 (1861); see other reports, p. 563.

[1] An *apothecary* is a person who professes to judge of internal disease by its symptoms and applies himself to cure that disease by medicines. Cresswell, J., in Apothecaries' Co. (Master, etc., of Apothecaries) *v.* Lotuega (1843), 2 M. & R., 495.

Apothecary covers the mixing and dispensing of medicines, and includes attendance and the giving of advice, which would be given by a physician who does not dispense medicine Davies *v.* Makuna, 54 L. J. (N. S.) Ch., 1,148 (1885); see other reports, p. 565.

A plaintiff who carries on business as an apothecary, contrary to 55 Geo. 3, c. 194, is not entitled to enforce an agreement made by him, restraining his assistant in the business, a qualified medical practitioner, from practising. Davies *v.* Makuna, 54 L. J. (N. S). Ch., 1,148; see other reports, p. 565.

The mere fact of a person's having supplied medicines does not necessarily show that he practised as an apothecary; a surgeon may lawfully do that, if the medicines are admin-

tioner" or "duly qualified medical practitioner," or any words implying a person recognized by law as a medical practitioner or member of the medical profession in any act of Parliament, mean a person registered under this act (*ib.*, s. 34, as amended 23 and 24 Viet., c. 7, s. 3).

EXEMPTIONS.—If they so desire, registered persons are exempt from serving on juries, and in all corporation, parish, ward, hundred, and town offices, and in the militia (*ib.*, s. 35).

DISQUALIFICATIONS.[1]—No unregistered person is permitted to hold any appointment as a physician, surgeon, or other medical officer in the military or naval service, or in emigrant or other vessels, or in any hospital, infirmary, dispensary, or lying-in hospital, not supported wholly by voluntary contributions, or in

istered in the cure of a surgical case; but if a surgeon undertakes to cure a fever, he steps out of his lawful province and is not authorized to administer medicine in such a case. Creswell, J., in Apothecaries' Co. *v.* Lotuega (1843), 2 M. & R., 495.

A *chemist* is one who sells medicine which is asked for, not one who selects the medicines and determines what he ought to give. Creswell, J., in Apothecaries' Co. *v.* Lotuega (1843), 2 M. & R., 495.

A *chymist* may prepare and vend, but not prescribe or administer medicine. Each (surgeon and *chymist*) is protected in his own branch; neither must interfere with province of the other. Allison *v.* Hayden (1828), 4 Bing., 619; see other reports, p. 554.

A chemist and druggist cannot practise as an apothecary unless licensed under the Apothecaries' Act (55 Geo. 3, c. 194); Apothecaries' Co. *v.* Greenough, 1 G. & D., 378; see n. 3, p. 565.

In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1805), Sir J. Mansfield defined a *physician* as a person who prescribes medicine for the sick.

Physician in a technical sense applies to persons in the highest grade of medical practitioners, and it is used in that sense in the statute, not in its popular sense of a person entitled to practise physic (*e.g.*, an apothecary). Hunter *v.* Clare, L. J. (N. S.) 68 Q. B., 278; see other reports, p. 566.

The sale of a non-dispensing medical practice, it seems, cannot be specifically decreed, as it is merely for the sale of a personal service, an introduction to patients. May *v.* Thomson, 47 L. T. (N. S.), 295; 20 Ch. D., 705; 51 L. J. Ch., 917.

In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1805), Mansfield, C.J., said that one meaning of *quack* is a person who sells nostrums of which the component parts are not known, but the word is more commonly used in opposition to a physician regularly qualified.

[1] An ordinary degree of skill is necessary for a surgeon who undertakes to perform surgical operations, in the same manner as it is necessary for every other man to have it in the course of his employment—he would be liable for *crassa ignorantia*, and justly responsible in damages for having rashly adventured upon the exercise of a profession without the ordinary qualification of skill, to the injury of the patient. Seare *v.* Prentice, 8 East, 348 (1807).

The advantage which the act secures to the public is to be able to distinguish qualified from unqualified physicians. Queen *v.* Steele, 13 Ir. Com. L., 398.

Cotton, L. J., in Davies *v.* Makuna, 54 L. J. (N. S.) Ch., 1,148 (1885) (see other reports, n. 3, p. 565), expressed the view that an unqualified person could carry on the business of physician, surgeon, or apothecary by means of duly qualified assistants who could be his agents (so also Fry, L. J.).

any lunatic asylum, jail, penitentiary, house of correction or of industry, parochial or union workhouse or poorhouse, parish union, or other public established body or institution, or to any friendly or other society for affording mutual relief in sickness, infirmity, or old age, or as a medical officer of health (*ib.*, s. 36, as amended 23 and 24 Vict., c. 7, s. 3).

No certificate required by any act from any physician or surgeon licentiate in medicine and surgery, or other medical practitioner, is valid unless the signer be registered under this act (*ib.*, s. 37, as amended 23 and 24 Vict., c. 7, s. 3).

Penalty.[1]—Wilfully procuring or attempting to procure one's self to be registered by making or producing or causing to be made or produced any false or fraudulent representation or declaration, or aiding or abetting therein, is a misdemeanor in England and Ireland, and in Scotland a crime or offence, punishable by fine or imprisonment. The imprisonment cannot exceed twelve months (*ib.*, s. 39).

Wilfully and falsely[2] pretending to be or taking or using the

[1] In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1805), Mansfield, C. J., said that where the prohibition was general and no particular punishment is pointed out, the offender is liable to indictment.

Mala praxis is a great misdemeanor and offence at common law (whether it be for curiosity and experiment or by neglect), because it breaks the trust which the party has placed in the physician. Dr. Groenvelt's Case, 1 Ld. Raymd., 213 (1697), *sub nom.* King *v.* Greenvelt, 12 Mod., 119. See note, p. 542.

Under the Dental Act the word person was held to be confined to a natural person and not to include a corporation. If the legislature intended to punish corporations it should have said so, even though the object of the legislature may be frustrated by failing to punish a corporation which cannot qualify under the act, and yet which uses the designation *surgeon-dentists*. O'Duffy *v.* Jaffe, 2 Ir. R. (1904), 27.

But a mandamus would not issue to compel the registrar of joint-stock companies to register the memorandum of association of a dental company styled "S. G. Rowell, Dentist, Limited," because the use of the name would involve a false representation, tending to mislead the public. King *v.* Registrar for Ireland, 2 Ir. R. (1904), 634.

[2] A person who did not pretend to have practised as a physician in the United Kingdom before October 1, 1858, and who truly represented that he was a doctor of medicine of the Metropolitan Medical College of New York is not liable to conviction under sec. 40. Carpenter *v.* Hamilton, 37 L. T., 157 (1877).

A person legally qualified under the medical act as a surgeon and apothecary was, before the passing of the act, the possessor of a German medical diploma and called himself doctor; he continued to use that description after the passing of the act, though not registered as doctor of medicine; *held*, not liable under sec. 40. He did not wilfully and falsely pretend. Ellis *v.* Kelly, 6 H. & N., 221 (1860); 30 L. J. M. C., 35; 6 Jur. (N. S.), 1,113; 3 L. T., 331; 9 W. R., 56.

Whether a man wilfully and falsely pretends, etc., is a question of fact. One who took and assumed the title of M.D. under a diploma from an American university(!) without any course of previous study or examination was properly convicted under sec. 40. Andrews *v.* Styrap, 26 L. T. (N. S.), 704 (1872).

name or title of physician, doctor of medicine,[1] licentiate in medicine and surgery,[2] bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title,[3] addition, or description implying registration under this act, or recognition by law as a physician or surgeon or licentiate in medicine and surgery, or practitioner in medicine, or apothecary,[4] is punishable on summary conviction by a penalty not exceeding £20 (*ib.*, s. 40, 41).

Deceased Physicians.—Every registrar of deaths in the United Kingdom, on receiving notice of the death of any medical practitioner, is required to transmit to the registrar of the general council and the registrar of the branch council a certificate of such death with the time and place, and on the receipt of such certificate the medical registrar is required to erase the name of the deceased from the register (*ib.*, s. 45).

Exceptions.—The general council was by the act empowered by special order to dispense with such provisions of this act or

In order to incur the penalty (sec. 40) a person must wilfully and falsely take or use one of the titles therein mentioned in such a manner as is calculated to deceive the public. Pearson, J., in Davies *v.* Makuna, 54 L. J. (N. S). Ch., 1148 (1885); see other reports, n. 3, p. 565; the use of the title in a private agreement, or on a plate not exposed to public view, would not infringe the section (*ib.*). See Appendix, p. 706.

[1] A man who is a licentiate of the Apothecaries' Society, and so registered under the act, but who is also an M.D. of a medical institution of Indianapolis, U. S. A., is not an M.D. under the act; when he signs himself M.D. and licensed practitioner he may be convicted under sec. 40. Calling one's self a physician because one is an apothecary is a fraud on the public. Regina *v.* Baker, 66 L. T., 416 (1891); 17 Cox C. C., 575; 56 J. P., 406.

Cases arising upon the facts, where unregistered persons used the title M.D., being the holders of that title from foreign institutions, will be found in Regina *v.* Lewis, etc., 60 J. P., 392 (1896); but the magistrate having found on the facts that the accused did not have an intent to deceive, the Queen's Bench Division of the High Court refused to order the magistrate to state a case. Grantham, J., said that no case had gone so far as to decide whether the use of the letters M.D. with other letters constitutes holding out as a registered M.D.

In the absence of evidence that a person adopted the description *physician* falsely and wilfully, his conviction should be quashed. Hunter *v.* Clare, L. J. (N. S.) 68 Q. B., 278; see other reports, p. 566.

[2] It is not every person that calls himself surgeon without being registered who is liable to conviction. He might have been in practice as a surgeon before the passage of the act, or the holder of a diploma from an institution entitled to confer it, or recognized by law as a surgeon. Pedgrift *v.* Chevallier, L. J (N. S.) 29 M. C., 225; see other reports, n. 1, p. 573.

There is no provision which prevents a man (unregistered) from practising as a surgeon; the penalty is that he is disqualified from recovering his fees and from holding certain offices. Steele *v.* Hamilton, 3 L. T. (N. S.), 322 (1860.)

[3] On indictment at common law for forging a diploma of the College of Surgeons see Regina *v.* Hodgson, Hodgson's Case, D. & B. Cr. Ca., p. 3 (1856); 20 L. J. M. C., 78; 2 Jur. (N. S.), 453; 4 W. R., 509; 7 Cox C. C., 122. Conviction quashed for want of specific intent to defraud.

[4] See n. 3, p. 565.

such part of any regulations made by its authority as to them should seem fit, in favor of persons at the time of its passage practising medicine or surgery in any part of Her Majesty's dominions other than Great Britain and Ireland by virtue of any of the qualifications in Schedule A, and in favor of persons practising medicine or surgery within the United Kingdom on foreign or colonial diplomas or degrees before the passage of this act, and in favor of any persons who had held appointments as surgeons or assistant surgeons in the army, navy, or militia, or in the service of the East India Company, or who were acting as surgeons in the public service, or in the service of any charitable institution, and in favor of medical students who commenced their professional studies before its passage (*ib.*, s. 46).

The *qualifications* specified in *Schedule A* are as follows:

1. Fellow, member (inserted 22 Vict., c. 21, s. 4), licentiate, or extra licentiate of the Royal College of Physicians of London (this is declared by 23 and 24 Vict., c. 66, s. 1, to denote the corporation of "The President and College or Commonalty of the Faculty of Physics in London"). (The act makes provision for a new charter with change of name to "The Royal College of Physicians of England," or retention of old name: *ib.*, s. 47, as amended 23 and 24 Vict., c. 66, s. 2.)[1]

[1] The Royal College of Physicians of London. By letters patent Henry VIII (Sept. 23, 1518), in the tenth year of his reign, "to restrain the boldness of wicked men, who professed physic more for avarice than out of confidence of a good conscience, whereupon very many incommodities did arise to the rude and credulous common people; therefore, partly imitating the example of the well-governed cities in Italy and many other nations, and partly inclined thereto at the request of the great men and doctors, . . . his physicians, and chiefly of the right reverend father in Christ and Lord Thomas (Wolsey)," instituted a college perpetual of doctors and grave men, who might publicly exercise physic in his city of London and the suburbs and seven miles from the city every way, and who might for his honor and in the name of the public good and care deter the ignorance and rashness of the malicious by their gravity and example, as well as punish them by his laws late made [*3 Hen. VIII, c. 11*] and by constitutions to be made by the college; and provided that no man should practise physic in London or within seven miles thereof unless he be admitted by the president and college under its seal. This charter was confirmed by Acts of Parliament 14 and 15 Hy. VIII, c. 5, and 1 Mary, c. 9. Dr. Bonham's Case, Coke's Reports, Pt. VIII [107 *a*], Thomas & Fraser's London ed., 1826, vol. IV, p. 355.

The Act of 14 and 15 Henry VIII (1522), confirmatory of the charter of Sept. 23, 10 Henry VIII, to the said college, recited that it was expedient and necesssary to provide "that no person of the said politick body and commonalty aforesaid be suffered to exercise and practise physick, but only those persons that be profound, sad, and discreet, groundly learned, and deeply studied in physic." By this act it seems that it was enacted that no person should

2. Fellow, member (inserted 22 Viet., c. 21, s. 4), or licentiate of the Royal College of Physicians of Edinburgh. (The act makes provision for the granting of a new charter to the Royal

thenceforth exercise or practise physick through England until examined at London by the president and three *elects* (chosen from "the most cunning and expert men of and in the said faculty in London"), except he be a graduate of Oxford or Cambridge.

The confirmatory act of 1 Mary, c. 9 (1553), authorized the president of the "college or commonalty of the faculty of physick of London" to punish "offenders and transgressors of the said faculty," to commit to "ward, gaol, or prison" "for his or their offences or disobedience contrary to any article or clause contained in the said grant or act," until discharged by the president and such persons as should be authorized by the college.

Dr. Bonham, in 1606 (Dr. Bonham's Case, VIII Coke [107 *a*], Thomas & Fraser's London ed., 1826, vol. IV, p. 355 *et seq.*; 2 Brownlow, 255 *et seq.*), was charged with practising physic, not admitted by letters under seal of the college; he was examined by the president and censors of the college, and found "less sufficient and unskilful to administer physic," and forbidden to practise, but disregarded the prohibition, and the censors ordered him to be sent to prison. He defied them on the ground that he was a doctor of physic of the University of Cambridge, and that the College in London had no control over him; he sued them for false imprisonment. The decision of the case involved several points of technical construction which will not be mentioned here, but it is interesting to note that it was decided, from a careful consideration of the charter and confirmatory acts of Parliament, that the censors had no power to fine and imprison every one who practised physic in London without license, but only those who so practised for ill and not by the good use and practice of physic. This case is interesting also for its application of rules of construction to this class of acts, particularly in their relation to physicians temporarily in London [118 *a*], and to the censors, as judges to give sentence, ministers to make summons, and parties to secure the forfeiture (*ib.*), stating that even an act of Parliament which conferred these three offices of judges, ministers, and parties on the same body of men would be contrary to the common law and controlled by it, and would be adjudged void and would not be put in execution. This case was criticised by Lord Ellesmere (observations on the Reports, p. 21) and by Holt, C.J., in Groenvelt *v.* Burwell, 1 Ld. Raymd., 468.

See College of Physicians *v.* Levett, 1 Ld. Raymd., 472 (A.D. 1699), denying right of graduate of Oxford to practise in London without license of College of Physicians.

For an action against the college for false arrest of a physician for malpractice, see Groenvelt *v.* Burwell, 1 Ld. Raymd., 454 (A.D. 1699).

The censors of the College of Physicians had authority over a practitioner in London whether he was of their body or not. Groenvelt *v.* Burwell, 1 Ld. Raymd., at p. 472.

In College of Physicians *v.* Dr. West, 10 Mod., 353 (temp. 3 Geo. I), the court held, under 14 and 15 Hen. VIII, c. 5, that a person who had taken his degree of doctor of physic in either of the universities might not practise in London, and within seven miles thereof, without a license from the College of Physicians; that the testimonials from the university were only in the nature of a recommendation, that they conferred no right, and that provisions of law confirming the privileges of the universities did not confer the right to practise in said location without a license.

A detailed discussion of the charter and acts governing the College of Physicians and their history and construction will be found in Rex *v.* Doctor Askew *et al.* (1768), 4 Burrows, at p. 2,195 *et seq.*

A legal history of the College of Physicians, particularly with respect to the right of its licentiates to compound the medicines which they prescribe, will be found in Atty.-Gen.

College of Physicians of Edinburgh, whereby its name is to be changed to "The Royal College of Physicians of Scotland," or its

v. Royal Coll. of Phys., 1 Johns & H. (1861), 561. The history of the Apothecaries' Company (incorporated 15 James I) is also to be found there. In that case the attorney-general, in his brief, stated that originally the entire domain of medicine was subjected to the College of Physicians, but that the domain was subsequently parcelled into three departments —physicians, who prescribed but did not compound; apothecaries, who compounded but did not prescribe (who might, however, attend patients, though not write prescriptions); and surgeons, who might both attend and compound in surgical cases. This historical differentiation is adverted to in the opinion of the vice-chancellor, Wood; see other reports, *infra*, p. 563.

The legal history of the President and College of the Faculty of Physic in London, incorporated by charter of Hen. VIII, d. September 23, 1518, and confirmed 14 and 15 Hen. VIII, c. 5 (enlarged 1 Mary, c. 9; 54 Geo. III, c. 118), is set forth in Royal College of Physicians *v.* General Medical Council, 59 J. P., 519 (1893); s. c. 62 L. J. Q. B., 329; 5 R., 323; 68 L. T., 496. See n. 5, p. 545.

The college had three orders—fellows, candidates, and licentiates. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561; see other reports, *infra*, p. 563.

From 32 Hen. VIII, c. 40, up to Medical Act 1858, the President and College of the Faculty of Physic in London granted diplomas to their fellows and also to their licentiates, being those who resided and practised within the limit mentioned in their charter, and extra-licentiates, being those who resided and practised outside such limit.

At the time of the passing of the Medical Act, 1858, there were a number of persons throughout England holding those diplomas and practising without any restriction or limitation whatever, except as to pharmacy, which was forbidden by by-law of said corporation. Royal College of Physicians *v.* General Medical Council, 59 J. P., 519 (for other reports of this case see *supra*).

A form of the license, styled Qualification to practise medicine, surgery, and midwifery, granted by the Royal College of Physicians in London, will be found in Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see *supra*).

For a distinction between membership in the College of Physicians and license from the college to practise, see the same case at pp. 2194, 2200, 2202; also Rex *v.* College of Physicians, 5 Burrows, 2,740 (A.D. 1771), where much of the history of the college is set out.

The rights of the College of Physicians with respect to the character of the licenses which they may grant are considered in Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H. (1861), 561; *held*, that the power of the college to make by-laws was not restricted by the Medical Act of 1858; see other reports, *infra*, p. 563.

The powers of the colleges with respect to their licentiates are limited by their charters; they are not limited by the Medical Act of 1858. A college may empower its licentiate to compound the medicines which he prescribes (notwithstanding the Apothecaries' Act, and notwithstanding the charter of the Apothecaries' Company). Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H. (1861), 561; see other reports, *infra*, p. 563.

The custom of the college, long continued, with respect to restrictions in its by-laws, does not prevent it from altering those by-laws and removing the restrictions. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561 (1861); see other reports, *infra*, p. 563.

The Apothecaries' Company has no grievance against the College of Physicians because the college removes the restriction of its by-law prohibiting its licentiates from compounding their own prescriptions. If they have any complaint (which is, inferentially, denied), it is against the licentiate when he proceeds to so compound his prescriptions. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561; see other reports, *infra*, p. 563.

There is nothing in the Medical

old name may be retained: *ib.*, s. 49, as amended 23 and 24 Vict., c. 66, s. 2).

3. Fellow or licentiate of the King's and Queen's College of

Act of 1858 which requires a licentiate to remain what he was at the passage of that act; therefore the College of Physicians may change or repeal their by-laws prohibiting a licentiate to compound the medicines which he prescribes. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H. (1861), 561; other reports, 30 L. J. Ch., 757; 7 Jur. N. S., 511; 4 L. T., 356; 9 W. R., 590, 599.

It is indicated in Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561 (1861), that there is nothing to prevent a licentiate of the Royal College of Physicians from also becoming a licentiate of the Apothecaries' Company; see other reports, *supra*.

In 1886 the Royal College of Physicians of London was a corporation legally qualified to grant diplomas in respect of medicine and *surgery*. They were therefore entitled to have their name entered by the General Medical Council on the list of bodies capable of granting qualifications admitting primarily to the register. Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see *supra*, p. 562).

On the right of a licentiate to examination before the *comitia minora* of the college for candidacy for election to membership or fellowship of the college (denied), see note to King *v.* College of Physicians, 7 Term Rep. (7 Durn. & E.), 295.

The college are obliged, in conformity to the trust and confidence placed in them by the crown and the public, to admit all that are fit and to reject all that are unfit (Lord Mansfield, in Rex *v.* Doctor Askew *et al.*, Censors of the College of Physicians, 4 Burrows, p. 2186, A.D. 1768; so held of the College of Physicians before the institution of the present Medical Council).

No person should be suffered to practise physic, but only such as have skill and ability, and have diligently applied themselves to the study and are well grounded in the knowledge of it; and, on the other hand, all persons who are so qualified have a right to be admitted to exercise and practise their profession, and the public have also a right to the assistance of such a person. *Ib.*

The conduct of the college should be fair, candid, and unprejudiced, not arbitrary, capricious, or biassed. Cases may happen where the rejection may be upon other grounds than insufficiency in skill, ability, or knowledge; for instance, badness of morals. *Ib.*

On the antiquity and use of *mandamus* to compel the college to admit a member; also on the custom and by-law for referring the examination to a committee, and the reservation of the final determination nevertheless to the college; also on the right of the body to reject a candidate after a ballot of its committee in his favor, see the same case.

In the requisites of membership in this college see same case at p. 2191.

A mandamus would lie if a person had been examined, approved, proposed, and elected, and the college refused to admit him; or if the college should refuse to examine the candidate at all. *Ib.* at p. 2193.

For a consideration of the powers of the censors of the College of Physicians, and a determination that they were judicial powers, see Groenvelt *v.* Burwell, 1 Ld. Raymd., at p. 467 (A.D. 1699). This case is also instructive in its consideration of the right to review in a court the determination of the censors, and a denial of that right.

On the conclusiveness of a determination by the college of a fact within its jurisdiction, holding that it is final, see Groenvelt *v.* Burwell, 1 Ld. Raymd., at p. 467 (A.D. 1699).

An action of debt for the penalties could be maintained by the college for practising without their license, and if the college failed in their action they were liable for costs. Coll. of Physicians *v.* Harrison (1829), 4 M. & Ry., 404.

Member was added to fellow, licentiate, or extra-licentiate of the Royal College of Physicians of London, by 22 Vict., c. 21. Royal College of

Physicians of Ireland.[1] (The act makes provision for the granting of a new charter to this college, whereby its name is to be changed to "The Royal College of Physicians of Ireland," or its old name may be retained: *ib.*, s. 51, as amended 23 and 24 Vict., c. 66, s. 2.)

4. Fellow or member or licentiate in midwifery of the Royal College of Surgeons of England[2] (see the MIDWIVES' Act, 1902, below, p. 574).

Physicians *v.* Gen. Med. Council, 59 J. P., 519 (for other reports of this case see *supra*, p. 562).

[1] KING'S AND QUEEN'S COLLEGE OF PHYSICIANS OF IRELAND.—The College of Physicians (of Ireland) cannot give a degree which will entitle to registration. They cannot give anything further than a license. Queen *v.* Steele, 13 Ir. C. L., 398.

It is only a *fellow* or *licentiate* of the King's and Queen's College of Physicians of Ireland who is entitled to register, under a qualification from that college. Queen *v.* Steele, 13 Ir. C. L., 398.

The King's and Queen's College of Physicians of Ireland is (1861) only empowered to give licenses, admittances, approbations, and allowances to act as physicians or practisers of physic; not to grant degrees. Queen *v.* Steele, 13 Ir. C. L., 398.

A *license* from the King's and Queen's College of Physicians of Ireland is a testimonial of the highest character. Fitzgerald, J., in Queen *v.* Steele, 13 Ir. C. L., 398.

[2] ROYAL COLLEGE OF SURGEONS OF ENGLAND.—Those interested in the legal history of surgeons and their evolution, legally, from the charter of 1 Hen. IV, granted to barbers, and in the history of the Royal College of Surgeons, should consult the references thereto in Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see p. 562).

Surgeons and physicians have run in distinct lines from the earliest times (*ob. dic.*). Royal Coll. of Phys. *v.* Gen. Med. Coun., 59 J. P., 519 (for other reports of this case see p. 562); cf. p. 543.

From the recitals of the charter of Edward IV to the Barbers of London (quoted in 18 Geo. II, c. XV), it appears that surgeons were employed at that time not only to cure and heal wounds, blows, and other infirmities, but to let blood and to draw teeth.

By 32 H. VIII, c. 42, the Barbers of London (incorporated by letters patent February 24th, 1 Edw., 4, and confirmed by Hy. VII and Hy. VIII) were united with the unincorporated Society of the Surgeons of London, under the name "Masters or Governors of the Mystery and Commonalty of Barbers and Surgeons of London." Among other provisions the law required every surgeon in London and for one mile around to expose a sign, "that all the King's liege people there passing may know at all times whither to resort for remedies in time of necessity." It also forbade barbers to use surgery or letting of blood or any other thing belonging to surgery, except drawing of teeth; and forbade surgeons to use the feat or craft of barbery or shaving, either through themselves or others. It empowered any person to keep a barber or surgeon in his house as servant.

Charles I, by letters patent in the fifth year of his reign, confirmed the rights of the corporation of barbers and surgeons (under 32 Hy. VIII, c. 42), and extended their field of operation to London and Westminster and seven miles beyond. These also provided for the examination and inspection of ships' surgeons, their medicines, instruments, and chests (see recitals of 18 Geo. II, c. 15).

Act 18 G. II, c. 15, separated the barbers from the surgeons; but 32 Hy. VIII, c. 42, continued operative against the barbers, as the later law only dissolved the union of the companies. Sharpe *v.* Law (1767), 2 Burr., 2,133.

Act 18 Geo. II, c. 15 (1745), separated the surgeons from the barbers,

5. Fellow or licentiate of the Royal College of Surgeons of Edinburgh [1] (see 6, below).

6. Fellow or licentiate of the Faculty of Physicians and Surgeons of Glasgow.[2] (The act makes provision for the possible amalgamation of the Royal College of Surgeons of Edinburgh with the Faculty of Physicians and Surgeons of Glasgow, in which case the united corporation is to be named "The Royal College of Surgeons of Scotland": *ib.*, s. 50.)

7. Fellow or licentiate of the Royal College of Surgeons in Ireland.

8. Licentiate of the Society of Apothecaries, London.[3]

for the improvement of surgery. This act was not to abridge the privileges or powers of the College of Physicians in London (*ib.*, s. 11).

It appears from sec. 19, Act 18 Geo. II, c. 15, that two anatomy lectures were already established—one the foundation of Edward Arris, the other of John Gall.

The Company of Surgeons had the power to make a by-law requiring apprentices to surgeons to understand the Latin tongue, as a pre-requisite to their apprenticeship, notwithstanding it was argued that this was in restraint of a common right, and not a necessary qualification to the performance of the art of a surgeon. Rex *v.* Master, etc., of Surgeons, 2 Burr., 892 (1759).

[1] In Smith *v.* Taylor, 1 Bos. & P. New R., 196 (1805), will be found a discussion of the rights of graduates of Scotch universities after the union with Scotland.

[2] Faculty of Physicians and Surgeons of Glasgow.—In 1599 James VI of Scotland commissioned Peter Low, chirurgeon, and Robert Hamilton, professor of medicine, and their successors indwellers of Glasgow to examine all persons professing or using the art of chirurgery upon their literature, knowledge, and practice, in Glasgow and certain named burghs and sheriffdoms, and to make statutes anent said arts and using thereof faithfully. The commission provided that it should not be lawful within said bounds to exercise medicine without the testimonial of a famous university where medicine is taught, or the leave of "our or our dearest spouse's chief medicinaries." This was confirmed by act of Parliament (Charles II, Sept. 11, 1672). The corporation thus formed was known as the Faculty of Physicians and Surgeons of Glasgow. The University of Glasgow was erected by virtue of a papal bull of Nicholas V in 1450, subsequently ratified by acts of Parliament. It founded a professorship of surgery in 1817 and proceeded to grant diplomas therein. The holders of these diplomas were (in 1838) not entitled to practise within the bounds of the faculty except by their license. University of Glasgow *v.* Faculty of Surgeons, 7 Cl. & F. (House of Lords), 958. It is stated by the Lord Chancellor (Cottenham) that the privilege now claimed by the faculty has been repeatedly exercised, citing instances. See this case for a statement of the exclusive privileges of this faculty to grant degrees in surgery to persons practising in Glasgow. See n. 1, *supra*.

[3] The Apothecaries' Act (55 Geo. 3, c. 194) is not repealed by implication by the Medical Act. Davies *v.* Makuna, 54 L. J. (N. S.) Ch., 1148 (1885); 29 Ch. D., 596; 53 L. T., 314; 33 W. R., 668; 50 J. P., 5.

It was no fraud on the legislature for the Royal College of Physicians to remove the restrictions of its by-law prohibiting its licentiates from compounding their own prescriptions, after the passage of the Medical Act of 1858. Atty.-Gen. *v.* Royal Coll. of Physicians, 1 Johns & H., 561 (1861); see other reports, p. 563.

Up to 1886 the only certificate

9. Licentiate of the Apothecaries' Hall, Dublin.

10. Doctor or bachelor or licentiate of medicine, or master in surgery of any university of the United Kingdom; or doctor of medicine, by doctorate granted prior to the passage of the act by the Archbishop of Canterbury.

11. Doctor of medicine of any foreign or colonial university or college, practising as a physician in the United Kingdom before October 1st, 1858, who shall produce certificates to the satisfaction of the council, of his having taken his degree of doctor of medicine after a regular examination, or who shall satisfy the council under section 46 (amended 22 Vict., c. 21, s. 5) of this act, that there is sufficient reason for admitting him to be registered.

Nothing in the above act shall prevent any person, not a British subject, who shall have obtained from any foreign university a degree or diploma of doctor in medicine, and who shall have passed the regular examinations entitling him to practise medicine in his own country, from being and acting as the resident physician or medical officer of any hospital established exclusively for the relief of foreigners in sickness; provided always such person is engaged in no medical practice except as such resident physician or medical officer (22 Vict., c. 21, s. 6).

The following qualification was added by 23 and 24 Vict., c. 7, s. 1:

A diploma or license in surgery granted by any university in Ireland legally authorized to grant the same.

The act 39 and 40 Vict., c. 40, in section 3, provides that all persons who have obtained from any university of the United Kingdom legally authorized to confer the same the degree of bachelor in surgery shall be permitted to register the same as a qualification under 21 and 22 Vict., c. 90.

The diploma of a member of the King's and Queen's College of Physicians in Ireland and the degree of Master in Obstetrics of any university in the United Kingdom are added to the quali-

granted by the Society of Apothecaries of London was one to practise merely as an apothecary. In 1886 a determination was made that thereafter no certificates or licenses should be granted by the governing bodies of the three branches of the profession (medicine, surgery, apothecary) unless the candidate passed qualifying examinations in all three. Hunter *v.* Clare, I. J. 68 Q. B., 278 (1899); 1 Q. B., 635; 80 L. T., 197; 47 W. R., 390; 63 J. P., 308.

fications in Schedule A of the Medical Act of 1858 (49 and 50 Vict., c. 48, s. 20).

The change of name of any of the corporations named in 21 and 22 Vict., c. 90, is not to alter or affect the qualifications constituted by the act (23 and 24 Vict., c. 66, s. 3).

Revocation of License.—The Society of Apothecaries may strike off from the list of licentiates of said society the name of any person who shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offence, or who shall, after due inquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect,[1] and the said society shall forthwith signify to the general council the name of the licentiate so stricken off (37 and 38 Vict., c. 34, s. 4).

Women.—The Society of Apothecaries is not relieved from any existing obligation, nor deprived of any right, to admit women to the examinations required for certificates to practise as apothecaries, or to enter in the lists of licentiates of said society any women who shall have satisfactorily passed such examinations and fulfilled the other general conditions imposed upon persons seeking to obtain from the said society a qualification to be registered under 21 and 22 Vict., c. 90 (*ib.*, s. 5).

The act 39 and 40 Vict., c. 41, extends the powers of every body entitled under 21 and 22 Vict., c. 90, to grant qualifications for registration so that it may grant any qualification for registration granted by such body without distinction of sex—but nothing in this act is compulsory.

The Medical Act of 1886 (49 and 50 Vict., c. 48) modified the foregoing acts as follows:

Examination.—A person cannot lawfully be registered under the medical acts in respect of any qualification referred to in any of those acts unless he has passed such qualifying examination in medicine, surgery, and midwifery as is in this act mentioned[2] (49 and 50 Vict., c. 48, s. 2).

A qualifying examination shall be an examination in medicine, surgery, and midwifery held for the purpose of granting a diploma or diplomas conferring the right of registration under the medical acts, by any of the following bodies:

(*a*) Any university in the United Kingdom, or any medical

[1] See n. 3, p. 549. [2] See n. 5, p. 545.

corporation legally qualified at the time of the passage of this act to grant such diploma or diplomas in respect of medicine or surgery;[1] or

(*b*) Any combination of two or more medical corporations in the same part of the United Kingdom, who may agree to hold a joint examination[2] in medicine, surgery, and midwifery, and of whom one at least is capable of granting such diploma as aforesaid in respect of medicine, and one at least is capable of granting such diploma in respect of surgery; or

(*c*) Any combination of any such university as aforesaid with any other such university or universities, or of any such university or universities with a medical corporation or corporations;[3] the bodies forming such combination being in the same part of the United Kingdom (*ib.*, s. 3 [1]).

The standard of proficiency at said examinations shall be such as suffices to guarantee the possession of knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery. It is the duty of the general council to secure the maintenance of such standard of proficiency, and it may appoint such number of inspectors as it may determine who shall attend at all or any of the said examinations (*ib.*, s. 3 [2]).

The inspectors are not to interfere with the conduct of any examination, but to report to the general council their opinion as to the sufficiency or insufficiency of every examination which they attend, and such other matters in relation thereto as the general council may require (*ib.*, s. 3 [3]).

If it appears to the general council that the standard of proficiency in medicine, surgery, and midwifery, or in any of those subjects or any branch thereof required at such examinations by any such body, is insufficient, the privy council, on a report from the general council after considering such report, and any objection thereto by any body to which it relates, may by order declare that the examination of such body or bodies shall not be deemed a qualifying examination for registration, and Her Majesty, with the advice of the privy council, may revoke such order if upon further report from the general council, or

[1] See n. 1, p. 560, *et seq.*

[2] See n. 7, p. 546.

[3] Within the meaning of sec. 3, subs. 1, Medical Act 1886, 49 and 50 Vict., c. 48, Apothecaries' Hall, Dublin, is a medical corporation capable of granting a diploma in respect of medicine, and may join with the College of Surgeons to hold a qualifying examination. Atty.-Gen. *v.* Gov., etc. Apothecaries' Hall, 21 L. R. Ir., 253.

any body to which it relates, it seems to her expedient (*ib.*, s. 4 [1]).

During the continuance of such order, the examinations held by the body or bodies to which it relates shall not be deemed qualifying examinations, and a diploma granted to a person passing such examinations shall not entitle such person to registration (*ib.*, s. 4 [2]).

If a medical corporation represent to the general council that it is unable to enter into a combination for holding a qualifying examination, and the general council is satisfied that the said corporation has used its best endeavor to do so on reasonable terms, the general council may on the application of such corporation appoint any number of examiners to assist at the examinations for granting a diploma conferring on the holder the right of registration (*ib.*, s. 5 [1]).

It is the duty of the said assistant examiners to secure at the said examinations the maintenance of such standard of proficiency in medicine, surgery, and midwifery as is required from candidates at qualifying examinations, and any examination held subject to this section shall be deemed a qualifying examination (*ib.*, s. 5 [2]).

Practitioner's Rights.[1]—A registered medical practitioner shall be entitled to practise medicine, surgery, and midwifery in the United Kingdom, and subject to any local law, in any other part of Her Majesty's dominions, and to recover in due course of law in respect of such practice, any expenses or charges in

[1] The benefit which results to the public is the opportunity of knowing and ascertaining that the persons registered have the qualifications which entitle them to the confidence of the public. The advantages to the registered person are the right to bring actions for the recovery of fees (subject to inhibition by the college of which they are members) and to serve under public boards, for no medical person who is not registered is eligible to so serve. Queen *v.* Steele, 13 Ir. C. L., 398.

This act, for the first time, required that there should be a register; those only who are entered thereon can sue for and obtain payment of any money payable to them for medical attendance or medical fees. Leeson *v.* Gen. Med. Coun., L. J. 59 Ch. (N. S.), 233; 43 Ch. D., 366; 61 L. T., 849; 38 W. R., 303.

Queen *v.* Downes, Eng. L. R. 1 Q. B. D., p. 25, is to the effect that, under the statute requiring a parent to provide adequate medical aid for his child, a positive duty arose, and a parent who neglected that duty, and the child having died, was properly convicted of manslaughter, though he belonged to a sect who never call medical aid, but call the elders of their church to pray over the sick, and though he pursued this course, and though he *bona fide* believed that medical aid was not required, and though he thought it wrong to call in medical aid. See Definition 1, p. 556.

respect of medicaments or other appliances, or any fees to which he may be entitled, unless he is a fellow of a college of physicians, the fellows of which are prohibited by by-law from recovering at law their expenses, charges, or fees, in which case such prohibitory by-law, so long as it is in force, may be pleaded in bar of any legal proceeding instituted by such fellow for recovery of expenses, charges, or fees (*ib.*, s. 6).

Members of General Council.—The constituent members of the general council are designated by this act in section 7.

Members of the general council representing the registered medical profession must themselves be registered medical practitioners, and members of the branch council for the part of the United Kingdom in which they are elected (*ib.*, s. 8).

Colonial and Foreign Practitioners.—When a person shows to the satisfaction of the registrar of the general council that he holds some recognized colonial medical diploma or diplomas granted to him in a British possession[1] to which this act applies, and that he is of good character, and is by law entitled to practise medicine, surgery, and midwifery in such British possession, he shall on application to the said registrar, and on the payment of such fee not exceeding £5, as the general council may determine, be entitled without examination in the United Kingdom to be registered as a colonial practitioner in the medical register; provided he proves to the satisfaction of the registrar:

(1) That the said diploma or diplomas was or were granted to him at a time when he was not domiciled in the United Kingdom, or in the course of a period of not less than five years during the whole of which he resided outside of the United Kingdom; or

(2) That he was practising medicine or surgery or a branch of medicine or surgery in the United Kingdom on the prescribed day, and that he has continued practising the same either in the United Kingdom or elsewhere for not less than ten years immediately preceding the prescribed day (*ib.*, s. 11).

When a person shows to the satisfaction of the registrar of the general council that he holds some recognized foreign medical diploma or diplomas granted in a foreign country to which this act applies, and that he is of good character, and is by law

[1] See Appendix, p. 706.

entitled to practise medicine, surgery, and midwifery in such foreign country, he shall on application to said registrar, and on payment of such fee, not exceeding £5, as the general council may determine, be entitled without examination in the United Kingdom to be registered as a foreign practitioner in the medical register; provided he proves to the satisfaction of the registrar:

(1) That he is not a British subject; or

(2) That, being a British subject, the said diploma or diplomas was or were granted to him at a time when he was not domiciled in the United Kingdom or in the course of a period of not less than five years, during the whole of which he resided out of the United Kingdom; or

(3) That, being a British subject, he was practising medicine or surgery, or a branch of medicine or surgery, in the United Kingdom on the prescribed day, and that he has continued practising the same in the United Kingdom or elsewhere for not less than ten years immediately preceding the said prescribed day (*ib.*, s. 12).

The medical diploma granted in a British possession [1] or foreign country to which this act applies, which is to be deemed requisite, shall be such a diploma as may be recognized by the general council as furnishing a sufficient guaranty of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery.

When the general council have refused to recognize any such diploma, the privy council may, on appeal, after communicating with the general council, order the general council to recognize such diploma.

If the refusal of the registration of a colonial or foreign practitioner be on any other ground, the registrar of the general council shall, if required, state in writing the reason for the refusal, and the person refused may appeal to the privy council, which, after communicating with the general council, may dismiss the appeal or order the general council to enter the name of the applicant on the register.

A person may be registered both as a colonial and foreign practitioner (*ib.*, s. 13).

The medical register shall contain separate lists of the names

[1] See Appendix, p. 706.

and addresses of colonial and foreign practitioners, and the provisions of 21 and 22 Vict., c. 90, relating to persons registered and to the medical register, and to offences, shall apply in the case of colonial and foreign practitioners registered under this act so far as may be (*ib.*, s. 14).

Any registered practitioner on the list of colonial or foreign practitioners who is in possession of or obtains any recognized colonial or foreign medical diploma granted in a British possession[1] or foreign country to which this act applies may cause a description of such diploma to be added to his name in the medical register (*ib.*, s. 15).

Any registered medical practitioner on the medical register by virtue of English, Scotch, or Irish qualifications, and in possession of a foreign degree in medicine, may cause a description of such foreign degree to be added to his name as an additional title in the medical register, provided he satisfy the general council that he obtained such degree after a proper examination and prior to the passage of this act (*ib.*, s. 16).

Her Majesty may from time to time, by order in the council, declare that this act be deemed to apply to any British possession[1] or foreign country which in the opinion of Her Majesty affords the registered medical practitioners of the United Kingdom such privileges of practice in the said British possessions or foreign countries as to Her Majesty may seem just; and on and after the day named in such order such British possession or foreign country shall be deemed to be a British possession or foreign country to which this act applies. Her Majesty may also renew or revoke any such order, and upon such revocation such possession or foreign country shall cease to be a possession or country to which this act applies without prejudice to the right of any person whose name has already been entered on the register (*ib.*, s. 17).

Nothing in the Medical Act of 1858 shall prevent a person holding a medical diploma, entitling him to practise medicine or surgery in a British possession to which this act applies, from holding an appointment as a medical officer in any vessel registered in that possession (*ib.*, s. 18). (See Appendix, p. 706).

Default of General Council.—In default of the general council to perform any duty, the privy council may notify their

[1] See Appendix, p. 706. See n. 1, p. 633.

opinion to the general council, and on the failure of the general council to comply with any direction of the privy council, the privy council may themselves give effect to such direction, and for that purpose exercise any power vested in the general council, and of their own motion do anything which they are authorized to do in pursuance of a report or suggestion from the general council (*ib.*, s. 19).

SANITARY SCIENCE.—Every registered medical practitioner to whom a diploma for proficiency in sanitary science, public health, or state medicine has after special examination been granted, by any college or faculty of physicians or surgeons or university in the United Kingdom, or by any such bodies acting in combination, shall, if such diploma appear to the privy council or general council to deserve recognition in the medical register, be entitled, on the payment of such fee as the general council may appoint, to have such diploma entered in the said register in addition to any other diploma or diplomas in respect of which he is registered (*ib.*, s. 21).

EVIDENCE.—Any act of the privy council shall be sufficiently signified by an instrument signed by the clerk of the council, and every order and act signified by an instrument purporting to be signed by the clerk of the council shall be deemed to have been duly made and done by the privy council, and every instrument so signed shall be received in evidence without proof of the authority or signature of the clerk of the council or other proof (*ib.*, s. 22).

The following copies of any orders made in pursuance of medical acts or this act shall be evidence:[1]

(1) Any copy purporting to be printed by the Queen's printer, or by any other printer in pursuance of an authority given by the general council.

(2) Any copy of an order certified to be a true copy by the registrar of the general council, or by any other person appointed by the general council, either in addition to or in exclusion of the registrar, to certify such orders (*ib.*, s. 23).

RIGHTS UNAFFECTED.—This act does not vary the rights of

[1] On the competency as evidence of a copy of the medical register purporting to be published under the Act 21 and 22 Vict., c. 90, and by authority, see Pedgrift *v.* Chevallier, L. J. 29 (N. S) M. C., 225, where the book produced was held competent; s. c. 8 C. B. (N. S.), 246; 6 Jur. (N. S.), 1341; 2 L. T., 360; 8 W. R., 500.

persons practising as registered medical practitioners on the day preceding the day when it goes into effect (*ib.*, s. 24).

In consequence of the repeal of any enactment repealed by this act, no person legally entitled to practise as a medical practitioner in any colony or part of Her Majesty's dominions other than the United Kingdom shall cease to be so entitled if he would have been entitled if no such repeal had taken place (*ib.*, s. 25).

DEFINITIONS.—In the act the word diploma means any diploma, degree, fellowship, membership, license, authority to practise, letters, testimonial, certificate, or other status or document granted by any university, corporation, college, or other body or by any departments of or person acting under the authority of the government of any country or place within or without Her Majesty's dominion (*ib.*, s. 27).

FEES.—The fees are to be determined by the general council within the limits set by the various sections authorizing fees.

MIDWIVES' ACT.—The Act of 2 Edward VII., ch. 17 (1903), is styled the Midwives' Act, 1902 (see title EXTENT OF ACT below, for its territorial application). Except as otherwise provided in the act it went into operation April 1st, 1903 (Act 2, Edw. VII., ch. 17, s. 19). Its provisions are as follows:

OFFENCE—PENALTY.—(1) From and after April 1st, 1905, any woman, not certified under this act, who shall take or use the name or title of midwife, either alone or in combination with any other word or words, or any name, title, addition, or description, implying that she is certified under this act, or is a person specially qualified to practise midwifery, or is recognized by law as a midwife, shall be liable on summary conviction to a fine not exceeding £5 (*ib.*, s. 1, subd. 1).

(2) From and after April 1st, 1910, no woman shall habitually and for gain attend women in childbirth otherwise than under the direction of a qualified medical practitioner, unless she be certified under this act; any woman so acting without being certified under this act shall be liable on summary conviction to a fine not exceeding £10.

EXCEPTIONS.—This section shall not apply to legally qualified medical practitioners or to any one rendering assistance in a case of emergency (*ib.*, s. 1, subd. 2).

QUALIFICATION.—(3) No woman shall be certified under

this act until she has complied with the rules and regulations to be laid down in pursuance of this act (*ib.*, s. 1, subd. 3).

Substitutes.—(4) No woman certified under this act shall employ an uncertified person as her substitute (*ib.*, s. 1, subd. 4).

Authority Not Implied from Certificate.—(5) The certificate under this act shall not confer upon any woman any right or title to be registered under the medical acts, or to assume any name, title, or designation implying that she is by law recognized as a medical practitioner, or that she is authorized to grant any medical certificate or any certificate of death, or of still-birth, or to undertake charge of cases of abnormality or disease in connection with parturition (*ib.*, s. 1, subd. 5).

Existing Midwives.—Any woman who within two years from April 1st, 1903, claimed to be certified under this act, was required to be so certified if she held a certificate of midwifery from the Royal College of Physicians of Ireland, or the Obstetrical Society of London, or the Coombe Lying-in Hospital and Guinness Dispensary, or the Rotunda Hospital for the Relief of the Poor Lying-in Women of Dublin, or such other certificate as might be approved by the Central Midwives' board, or should produce evidence satisfactory to the board that at the passing of the act (July 31st, 1902) she had been for at least one year in bona-fide practice as a midwife, and bore a good character (*ib.*, s. 2).

Central Midwives' Board.—This board is to consist as follows: (1) Four registered medical practitioners; one appointed by the Royal College of Physicians, London, one by the Royal College of Surgeons of England, one by the Society of Apothecaries, and one by the incorporated Midwives' Institute.

(2) Two persons, one of whom shall be a woman, appointed by the Lord President of the Council.

(3) One person appointed by the Association of County Councils, one by the Queen Victoria's Jubilee Institute for Nurses, one by the Royal British Nurses' Association.

Members are eligible for reappointment (*ib.*, 3).

The board is empowered (1) to frame rules regulating the issue of certificates and the conditions of admission to the roll of midwives, the course of training and the conduct of examinations, and the remuneration of examiners, the admission to the roll of women already in practice as midwives at the passing of the act,

and regulating, supervising, and restricting within due limits the practice of midwives; and deciding the conditions under which midwives may be suspended from practice, and defining the particulars required to be given in any notice under sec. 10; (2) to appoint examiners; (3) to decide where and when examinations shall be held; (4) to publish annually a roll of midwives who have been duly certified under the act; (5) to decide upon removal from the roll, of the name of any midwife for disobeying the rules and regulations from time to time laid down under the act by the board, or for other misconduct, and also to decide upon the restoration to the roll of the name of any midwife so removed; (6) to issue and cancel certificates, and generally to do any other act or duty which may be necessary for the due and proper carrying out of the provisions of this act. Rules framed under this section are valid only if approved by the privy council. The privy council is required to take into consideration representations which the general medical council may make with respect thereto (*ib.*, s. 3).

Appeal.—Any woman thinking herself aggrieved by any decision of the board removing her name from the roll of midwives may appeal therefrom to the High Court of Justice within three months after the notification of such decision to her, but no further appeal shall be allowed (*ib.*, s. 4).

Fees—Expenses.—To the Central Midwives' board for examination or certificate, such fee as the board may with the approval of the privy council from time to time determine, not to exceed 1 guinea (*ib.*, s. 5).

Midwives' Roll.—There shall be a roll of midwives containing (1) the names of those midwives who have been certified under sec. 2 of this act; (2) the names of all other midwives who have been certified under this act. The entry on the roll shall in every case indicate the conditions in virtue of which the certificate is granted (*ib.*, s. 6).

The secretary of the board is charged with the custody of the roll (*ib.*, s. 7). A copy of the roll purporting to be printed by the authority of the board, or to be signed by its secretary shall be evidence in all courts that the women therein specified are certified under this act. The absence of the name of any woman from such copy shall be evidence, until the contrary be made to appear, that such woman is not certified under this act, provided

that in the case of any woman whose name does not appear in such copy a certificate under the hand of the secretary of the entry of her name on the roll shall be evidence that she is certified under this act (*ib.*, s. 7).

Local Supervising Body.—Every council of a county or county borough in England and Wales is the local supervising authority over midwives in the area of their county or county borough. It is the duty of this body to exercise general supervision over all midwives practising within their area, in accordance with the rules laid down under the act; to investigate charges of malpractice, negligence, or misconduct on the part of any midwife practising within their area; and should a *prima facie* case be established, to report it to the central midwives' board; to suspend any midwife from practice in accordance with the rules under this act, if such suspension appears necessary in order to prevent the spread of infection; to report at once to the board the name of any midwife practising within their area, convicted of an offence; during January, each year, to supply the secretary of the central midwives' board with the names and addresses of all midwives who during the preceding year have notified their intention to practise within their area, and to keep a current copy of the roll of midwives accessible at all reasonable times for public inspection; to report at once to the central midwives' board the death of any midwife or any change of the name or address of any midwife in their area, so that the necessary alteration may be made in the roll; to give due notice of the effect of the act so far as practicable to persons at the passage of the act using the title of midwife (*ib.*, s. 8).

The local supervising authority may delegate with or without restrictions or conditions any powers or duties conferred or imposed upon them under this act, to a committee appointed by them, and consisting either wholly or partly of members of the council, and the provisions of subsections 1 and 2 of section 82 of the local government act, 1888, shall apply to every committee appointed under this section, and to every council appointing the same, and women shall be eligible to serve on such committees (*ib.*, s. 8).

A county council may delegate, with or without restrictions or conditions, any powers or duties conferred or imposed upon them by or in pursuance of this act to any district council within

the area of the county; and the powers and duties so delegated may be exercised by a committee appointed by such district council, and consisting either wholly or partly of members of the district council, and women shall be eligible to serve on any such committee (*ib.*, s. 9).

The provisions of this section (9) apply to the administrative county of London in like manner, as if each metropolitan borough were a county district and the borough council were the district council of that district (*ib.*, s. 9).

Notice of Intention to Practise.—Every woman certified under this act shall, before holding herself out as a practising midwife or commencing to practise as a midwife in any area, give notice in writing of her intention so to do to the local supervising authority, or to the body to whom for the time being the powers and duties of the local supervising authority shall have been delegated under this act, and shall give a like notice in the month of January in every year thereafter during her continuance of practice in that area (*ib.*, s. 10).

Such notice shall be given to the local supervising authority of the area within which such woman usually resides or carries on her practice, and the like notice shall be given to every other local supervising authority or delegated body within whose area she at any time practises or acts as a midwife, within forty-eight hours after she commences so to practise or act. Every such notice shall contain such particulars as may be required by the rules under this act to secure the identification of the person giving it; and if any woman omits to give the said notices of any of them, or knowingly or wilfully makes or causes, or procures any other person to make any false statement in any such notice, she shall on summary conviction be liable to a fine not exceeding £5 (*ib.*, s. 10).

Offence—Penalty.—Any woman who procures or attempts to secure a certificate under this act by making or producing, or causing to be made or produced, any false and fraudulent declaration, certificate, or representation, in writing or otherwise, shall be guilty of a misdemeanor, punishable by imprisonment, with or without hard labor, for any term not exceeding twelve months (*ib.*, s. 11).

Any person wilfully making or causing to be made any falsification in any matter relating to the roll of midwives shall be

guilty of a misdemeanor, punishable with or without hard labor, for any term not exceeding twelve months (*ib.*, s. 12).

PROSECUTION.—Offences punishable under this act on summary conviction may be prosecuted by the local supervising authority (*ib.*, s. 13).

APPEAL.—Where any woman deems herself aggrieved by the determination of any court of summary jurisdiction under this act, she may appeal to the court of Quarter Sessions (*ib.*, s. 14).

MEDICAL PRACTITIONERS.—This act does not apply to legally qualified medical practitioners (*ib.*, s. 16).

EXTENT OF ACT—MEDICAL COUNCIL.—This act shall not extend to Scotland or Ireland. The general medical council shall act by the English branch council, which for all purposes of this act shall occupy the place of the general medical council (*ib.*, s. 7).

DEFINITIONS.—The term *midwife* means a woman who is certified under this act unless the context otherwise requires.

Central midwives' board means the board constituted under this act to carry out the provisions of this act (*ib.*, s. 18).

FEES.—See FEES above (s. 5).

BRITISH COLUMBIA.

See Appendix, p. 707.

THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA.—The members of the medical profession, formerly incorporated under the name of "The Medical Council of British Columbia," are a body corporate, whose name was changed by the "Medical Act, 1898," to "The College of Physicians and Surgeons of British Columbia" (Medical Act, 1898; Act, 1898, c. 9, s. 2).

Every person registered under this act or any other act of the legislature relating to the medical profession is a member of the said corporation (*ib.*, ss. 3, 4).

THE COUNCIL.—There is a council of said college, composed of seven licensed medical practitioners; no person is eligible

[1] The law (as it was in 1895) is a *facsimile* of the Ontario act, rendered necessary for the protection of the public from being practised upon by persons incompetent to treat diseases safely and intelligently, and unskilled and untrained in the safe application of medical science and remedies. Regina *v.* Barnfield, 4 Br. Col. R., 305 (1895).

thereto except a practitioner duly registered under this act or the acts mentioned in section 3 (*ib.*, ss. 5, 6).

All duly registered practitioners are entitled to vote at any election, but no member of the college, in arrears for his annual fees or any part thereof, is entitled to vote for members of the council or is eligible for election as a member thereof (*ib.*, s. 10). In case of doubt or dispute as to the legality of the election of any member of the council, the council is to hold and decide who is the legally elected member, or may, in case of an election found to have been illegal, order a new election (*ib.*, s. 11).

The council appoints annually from amongst themselves a president, vice-president, registrar, treasurer, and other officers, to hold office during the pleasure of the council (*ib.*, s. 12), and also annually an *executive committee* to take cognizance of and action upon all such matters as shall be delegated to it by the council or such as may require immediate interference or attention between the adjournment of the council and its next meeting, and all such acts shall be valid only until the next ensuing meeting of the council; but such committee shall have no power to alter, repeal, or suspend any by-law of the council (*ib.*, s. 13).

The law regulates in detail the holding of meetings of the council and the compensation and mileage of its members (*ib.*, ss. 14, 15, 16, 17, 18).

The Register.—The council is required to cause to be kept by the registrar a register called "The British Columbia Medical Register," in which shall be entered the name of every person registered under this act and any other act of the legislature of British Columbia relating to the medical profession, and from time to time all persons who have complied with this act and the rules and regulations of the council respecting qualifications of practitioners of medicine, surgery, and midwifery in the province (*ib.*, s. 19).

The registrar is required to keep his register correct, in accordance with the provisions of this act and the rules, orders, and regulations of the council, and from time to time to make the necessary alterations in the addresses and qualifications of persons registered under this act (*ib.*, s. 25).

Only those whose names are inscribed in said register are deemed qualified and licensed to practise medicine, surgery, and midwifery in the province (*ib.*, s. 20).

The register is required to be kept at all times open and subject to inspection by any duly registered practitioner in British Columbia (*ib.*, s. 21).

FORMER PRACTITIONERS.—Any person duly registered in the British Columbia medical register under the "Medical Act" (R. S., B. C., c. 26) or any acts relating to the medical profession when this act shall take effect (May 20th, 1898), shall be deemed to be registered under this act (*ib.*, s. 22); and the registrar was required, immediately upon his appointment, without any fee whatever, to enter in the register the name of every person mentioned in the third section of this act and not already entered therein or duly erased therefrom (*ib.*, s. 23).

QUALIFICATION.[1]—Every person possessing one or more of the following qualifications, on complying with the requirements and payment of the fees fixed by by-law of the council for each particular class, is entitled to be registered on producing to the registrar the documents proving such qualifications and on payment of the fees fixed by the council, not to exceed $100:

(*a*) Every person who was entitled to be registered on the coming into force of this act.

(*b*) The council is required to admit upon the register every person mentioned in 49 and 50 Vict., c. 48, of the Acts of Parliament of the United Kingdom, duly registered under the imperial Medical Act, prior to and inclusive of June 30th, 1887, upon complying with the orders, regulations, or by-laws of the council and giving due proof of such registration, and that the person applying for registration has not lost the benefit of same by reason of misconduct or otherwise. (See Appendix, p. 707.)

(*c*) The council is required to admit upon the register any person who shall procure from any college or school of medicine and surgery requiring at least four years' course of study, a diploma of qualification; provided that where the college or school of medicine did not require a course of study of at least four years, but a postgraduate course has been taken which in point of time added to the college or school of medicine course completes a period of four years, it shall be deemed sufficient; provided he furnish to the council satisfactory evidence of identity and pass before the members thereof or such of them as may be appointed for the purpose a satisfactory examination touch-

[1] See n. 1, p. 579.

ing his fitness and capability to practise as a physician and surgeon.

(*d*) Any homœopathic physician holding a diploma of qualification from any authorized school or college requiring at least a four years' course of study which has been undergone by the applicant, may be registered under this act upon passing before the council, or such of them as may be appointed for that purpose, a satisfactory examination in anatomy, physiology, pathology, chemistry, obstetrics, and surgery (*ib.*, s. 24).

Annual Fee and Certificate of Qualification.—Each member of the College of Physicians and Surgeons of British Columbia is required to pay to the registrar or any person deputed by him to receive it, on the first day of January, in the year for which it is imposed, such annual fee as may be determined by by-law of the council, not less than $2.50 nor more than $10, toward the general expenses of said college; and to obtain annually a certificate under seal of said college, stating his qualification to practise, and that the certificate is in force for one year from its date. Such annual fee is a debt due by the member to the college, recoverable with costs in the name of the college in the county court, small debts court, or other court having jurisdiction at the place where the member resides (*ib.*, s. 27).

Duties of Council.—The council is required to make orders, regulations, or by-laws for regulating the register and the fees to be paid for registration (*ib.*, s. 28).

Registration of Higher or Other Qualifications.—Every person registered under this act who obtains a higher degree or any qualification other than that in respect to which he has been registered, shall be entitled to have such higher degree or additional qualification inserted in the register, in substitution for or in addition to the qualification previously registered, on payment of such fees as the council may appoint (*ib.*, s. 29).

Evidence of Right to Registration.—No qualification shall be entered on the register, either on the first registration or by way of addition to a registered name, unless the registrar be satisfied by proper evidence that the person claiming is entitled to it; any appeal from the registrar's decision may be decided by the council (*ib.*, s. 30); if the registrar be dissatisfied with the evidence adduced by the person claiming to be registered, he may, subject to an appeal to the council, refuse such registration

until the person claiming to be registered has furnished proper evidence, duly attested by oath or affirmation before the judge of any county court (*ib.*, s. 31).

FALSIFICATION OF THE REGISTER.—If the registrar make or cause to be made any wilful falsification in any matter relating to the register, he shall incur a penalty of $50 and shall be disqualified from again holding that position (*ib.*, s. 32).

ERASURES FROM THE REGISTER.—Any entry in the register proved to the satisfaction of the council to have been fraudulently or incorrectly made may be erased by order of the council (*ib.*, s. 33).

FRAUDULENT REGISTRATION.—If a person procures or causes to be procured his registration by means of any false or fraudulent representations or declaration, verbal or written, the registrar may, on receipt of sufficient evidence to that effect, report the matter to the council, and, on the written order of the president, attested by the seal of the College of Physicians and Surgeons of British Columbia, erase the name of such person from the register and make known the fact and the cause thereof in the British Columbia *Gazette*, and after such notice has appeared such person shall cease to be a member of said college and to enjoy any of the privileges enjoyed or conferred by registration at any future time, without the express sanction of the council (*ib.*, s. 34).

FORFEITURE OF RIGHT.—Any registered practitioner convicted before or after the passing of this act or before or after registration, of any felony or misdemeanor, thereby forfeits his right to registration and by direction of the council his name is required to be erased from the register; or in case a person known to have been convicted of felony or misdemeanor presents himself for registration, the registrar has power to refuse such registration; and if any person registered shall after due inquiry by the council[1] be adjudged to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the registrar to erase the name of such person from the register (*ib.*, s. 35).

[1] There is nothing in the act which confines inquiries to matters which are capable of being investigated in a court of law. The charges of infamous or unprofessional conduct can be dealt with independent of any legal rights the complainant may have. *In re* Medical Act; *ex parte* Inveranty. 10 Br. Col., 268 (1903).

Inquiry into Liability to Erasure of Name from Register.[1]—The council may,[2] and on application of three registered medical practitioners shall, cause inquiry into case of person alleged to be liable to erasure of his name, under last preceding section, and on proof of conviction of infamous or unprofessional conduct shall cause his name to be erased from the register, provided such erasure shall not be made on account of his adoption or refraining from adopting the practice of any particular theory of medicine or surgery, nor on account of conviction for a political offence out of Her Majesty's dominions, nor for an offence which ought not, in the opinion of the council or the committee of inquiry (under section 40), either from the trivial nature of the offence or the circumstances under which it was committed, to disqualify a person from practising medicine or surgery (*ib.*, s. 36).

The council may order paid, out of any funds at their disposal, such costs as to them seem just, to any person against whom any complaint has been made which when finally determined is found frivolous and vexatious (*ib.*, s. 37).

Restoration of Name or Other Entry Erased.—Where the council direct the erasure of a name or other entry, it shall not be again entered on the register except by direction of the council or order of a judge of the supreme court (*ib.*, s. 38).

If the council think fit they may direct the registrar to restore any name or entry erased, without fee or on payment of such fee, not exceeding the registration fee, as it may from time to time fix (*ib.*, s. 39).

Committee of Inquiry.—The council shall, for the purpose of exercising the power of erasure or restoration of any name or entry, ascertain the facts by a committee of their own body, not exceeding five in number, of whom a quorum shall be not

[1] The period of limitations fixed by sec. 61 has no bearing on secs. 35 and 36. *In re* MedicalAct; *Ex Parte* Inveranty, 10 Br. Col., 268 (1903); Queen *v.* Barnfield, 3 Can. Cr. Cas., 161 (1895).

[2] The act draws a sharp distinction between the permissive *may* and the compulsory *shall* of sec. 36. In cases under sec. 36, in which the council is merely permitted to hold the inquiry, its determination not to make it will not be reversed by mandamus. Where the case is discretionary and they have exercised their discretion, the court on an application to compel an inquiry by mandamus will deny the application without examining the merits of the case. *In re* Medical Act; *Ex Parte* Inveranty, 10 Br. Col., 268 (1903).

less than three; and a written report may be acted on for the exercise of said powers of the council (*ib.*, s. 40).

COUNSEL.—The committee may employ such legal or other assessor or assistant as it may think necessary or proper, and the person whose conduct is the subject of inquiry has the right to be represented by counsel (*ib.*, s. 43).

CONDUCT OF THE INQUIRY.—At least one week before the first meeting of the committee for taking evidence or ascertaining the facts, a notice must be served on the person who is the subject of the inquiry, embodying a copy of the charges or statement of the subject-matter of the inquiry, and statement of time and place of meeting. The testimony is taken under oath, and there is full right of cross-examination and to call for evidence in defence and reply. In the absence of person notified, on proof of personal service, the committee may proceed with the inquiry and make report of facts without further notice to him (*ib.*, s. 44).

PROTECTION OF THE COUNCIL.—No action shall be brought against the council or committee for anything done *bona fide* under this act, notwithstanding want of form (*ib.*, s. 45).

APPEAL.—A person whose name has been ordered erased may appeal from the decision of the council to any judge of the supreme court within six months from the order for erasure, and the judge may make such order of restoration or confirmation or for other inquiries by committee or council into the facts and as to costs as to the judge shall seem right (*ib.*, s. 45).

BURDEN OF PROOF.—In any trial under the act, the burden of proof as to registration is on the person charged (*ib.*, s. 47).

EVIDENCE OF REGISTRATION.—In all cases where proof of registration is required, the production of a certificate of due registration, certified under the hand of the registrar and seal of the said college, shall be sufficient evidence of registration; any such certificate purporting to be signed by any person as registrar under this act is *prima facie* evidence that he is registrar without proof of his signature or that he is registrar (*ib.*, s. 48).

The registrar of the council, under the direction of the council, is required to cause to be published from time to time a correct register of the names and residences, with the medical titles, diplomas, and qualification conferred by any college or body and the dates thereof, of all persons appearing on the register at the

date of publication (*ib.*, s. 49). A copy of such register for the time being, purporting to be so printed and published, shall be *prima facie* evidence that the persons therein specified are registered according to the provisions of this act (*ib.*, s. 50), and, except as provided in section 51, the absence of the name of any person from such copy shall be *prima facie* evidence that such person is not registered according to this act (*ib.*, s. 52).

In the case of a person whose name does not appear in such copy, a certified copy under the hand of the registrar and the seal of the college of the entry of the name of such person on the register shall be evidence that such person is registered under this act (*ib.*, s. 51).

Rights of Registered Practitioner.—Every person registered under the act is entitled, according to his qualification or qualifications, to practise medicine, surgery, or midwifery, or any of them, as the case may be, in British Columbia, and to demand and recover in any court of law, with full costs of the suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicine or other medical appliances rendered or supplied by him to his patients (*ib.*, s. 53).

Neglect to Register.—Those entitled to register and neglecting or omitting to do so are not entitled to any of the rights or privileges conferred by registration, so long as such neglect or omission continues; and are liable to all penalties imposed by this or any other act in force against such unqualified or unregistered practitioners (*ib.*, s. 54).

Unlawful Practices.—It is not lawful for any person not registered to practise medicine or surgery for hire, gain, or hope of reward (*ib.*, s. 55).[1] To so practise or profess to practise medicine, surgery, or midwifery, or advertise to give advice in medicine, surgery, or midwifery, is punishable, on summary conviction before any justice of the peace, with a penalty not exceeding $100 (*ib.*, s. 63).

[1] A person is entitled to sell "patent" medicines as publicly as he likes, so long as they are not shown to be inimical to the public health. The mere selling without an inducement to any one is not practising medicine; but he is not entitled to call upon people to submit to his personal manipulation or inspection and dispensing of his medicine to them, asking their symptoms, diseases, or complaints, and treating them therefor. Where he does this in order to sell his remedies, this is for gain or hope of reward. Such practice is within the meaning of sec. 41. Regina *v.* Barnfield, 4 Br. Col. R., 305 (1895).

UNREGISTERED PERSONS.—No person unless registered under this act is entitled to recover in any court of law any charge for any medical or surgical advice or attendance or the performance of any operation or for any medicine that he may have prescribed or supplied; but this shall not extend to the sale of any drug or medicine by any duly licensed chemist or druggist (*ib.*, s. 56).

Appointments as medical officer, physician, or surgeon in any branch of the public service, or in a hospital or a charitable institution, are conferred only on persons registered under this act, or who hold an interim certificate of qualification, which shall be granted by the executive committee of the College of Physicians and Surgeons of British Columbia, if requested by the lieutenant-governor in council, in respect of a medical appointment to the provincial public service. In such case, such certificate shall hold good until the next regular examination of said college, and shall carry with it all the rights and privileges of a registration under this act for the time covered by the interim certificate (*ib.*, s. 57, as amended Act 1899, c. 4).

No certificate required from any physician or surgeon or medical practitioner is valid unless the signer is registered under this act (Medical Act, 1898, s. 58).

DEFINITION.—"Legally qualified medical practitioner," or "duly qualified medical practitioner," or any other words or expression importing legal recognition of any person as a medical practitioner or member of the medical profession when used in any act or law, so far as it applies to this province, shall mean a person registered under this act (*ib.*, s. 59).

EXEMPTIONS.—Every person registered under this act is exempt, if he desire, from serving on all juries and inquests whatsoever (*ib.*, s. 60).

LIMITATION OF ACTIONS FOR NEGLIGENCE OR MALPRACTICE.—No duly registered member of the said college shall be liable for negligence or malpractice by reason of professional services requested or rendered, unless the action be begun within one year from the date, when in the matter complained of, such professional services are terminated (*ib.*, s. 61).[1]

OFFENCE—PENALTY.—To wilfully procure or attempt to procure registration by false or fraudulent representation or de-

[1] See n. 1, p. 584.

claration, verbal or written, is punishable by a penalty not exceeding $100. To knowingly aid or assist therein is punishable with a penalty of from $20 to $50 for each offence (*ib.*, s. 62).

For a person wilfully or falsely to pretend to be a physician, doctor of medicine, surgeon, or general practitioner, or assume any title, addition, or description other than he actually possesses and is legally entitled to, is punishable by a penalty of from $10 to $50 (*ib.*, s. 64).

A person not registered pursuant to this act who takes or uses any name, title, addition, or description implying or calculated to lead people to infer that he is registered under this act or recognized by law as a physician, surgeon, accoucheur, or licentiate in medicine, surgery, or midwifery, is punishable with a penalty of from $25 to $100 (*ib.*, s. 65).

PROSECUTIONS.—Prosecutions may be brought before any justice of the peace having jurisdiction where any offence has been committed.

Costs may be awarded in addition to the penalty against an offender, and on default of payment he may be committed to the common jail for not exceeding one month unless the costs are sooner paid (*ib.*, s. 67).

All prosecutions are in accordance with the "Summary Convictions Act" and any act or acts amending the same (*ib.*, s. 68).

Any person may be prosecutor or complainant, and the council may allot such portion of the penalties recovered as may be expedient, toward the payment of such prosecution (*ib.*, s. 69).

LIMITATIONS.—Prosecutions under the act must be commenced within six months from the date of the offence (*ib.*, s. 70).

STAY.—The council, by an order signed by the president, with the seal of the council, may stay proceedings in prosecutions where deemed expedient (*ib.*, s. 72).

FEES.—To the registrar, for registration under this act, such sum as may from time to time be fixed by by-law of the council, but not exceeding $100 (*ib.*, s. 24).

To the registrar or his deputy, on January 1st, annually, not more than $10 and not less than $2.50, as may from time to time be fixed by by-law of the council (*ib.*, s. 27).

CANADA.[1]

MEDICAL ACT.—The act is cited as The Canada Medical Act, 1902 (Act 1902, 2 Edw. VII., c. 20, s. 1).

DEFINITIONS.—Unless the context otherwise requires, *medicine* includes surgery and obstetrics, and excludes veterinary surgery; *medical* includes surgical and obstetrical; *provincial medical council* includes provincial medical board, and College of Physicians and Surgeons; *medical school* includes any institution wherein medicine is taught; *students* means only persons admitted to the study of medicine in virtue of provincial laws (*ib.*, s. 2).

MEDICAL COUNCIL.—The persons who shall be, under the provisions of this act, members of the medical council of Canada, constitute a corporation under the name, The Medical Council of Canada, hereinafter called the council (*ib.*, s. 3).

The purposes of the council shall be: (*a*) to promote and effect the establishment of a qualification in medicine, such that the holders shall be acceptable and empowered to practise in all the provinces of Canada; (*b*) the establishment of a register for Canada of medical practitioners, and the publication and revision from time to time of such register; (*c*) the determination and fixing of the qualifications and conditions necessary for registration, including the courses of study to be pursued by students, the examinations to be undergone, and generally the requisites for registration; (*d*) the establishment and maintenance of a board of examiners for examination and for the granting of certificates of qualification; (*e*) the establishment of such a status of the medical profession in Canada as shall insure recognition thereof in the United Kingdom, and enable Canadian practitioners to acquire the right to registration under the medical acts of the imperial parliament; (*f*) the enactment with the consent and at the instance of the medical councils of the various provinces of Canada, of such provincial legislation as is necessary to supplement the provisions of this act and to effect the foregoing purposes (*ib.*, s. 4).[2]

[1] The individual provinces also have medical laws; this act contemplates that the provincial laws shall continue, but that they will (see sec. 3) legislate to accept registration under this act as equivalent to provincial registration.

[2] The following provinces have so legislated: Manitoba, see p. 598; Northwest Territories, see p. 620; Nova Scotia, see p. 625; Prince Edward Island, see p. 654; see Yukon, p. 673.

The council is composed of (*a*) one member from each province appointed by the governor in council; (*b*) members representing each province, in the proportion to the number of practitioners registered under the law of the province of one for the first one hundred or fraction, one for the second one hundred or fraction thereof over one-half, and one for each succeeding six hundred or fraction thereof over one-half, such members elected, one by the provincial medical council, the others by the duly registered medical practitioners having received a license or certificate of registration within the province under regulations to be made in that behalf by the provincial medical council; no person shall be so elected who is in any wise connected with the teaching staff or governing board of any university or incorporated medical school which under the provisions of this act is entitled to elect a member of the council, nor any person belonging to a particular and distinct school of practice of medicine mentioned and intended in (*d*) of this section; (*c*) one member from each university or from any incorporated medical college or school in Canada having an arrangement with a university for conferring degrees on its graduates, engaged in the active teaching of medicine, who shall be elected by the university or by such college or school under such regulations as may appertain; (*d*) three members who shall be elected by such practitioners in Canada as by the law of the province wherein they practise are now (1902) recognized as forming a particular and distinct school of practice of medicine, and as such are by the said law entitled to practise in the province. No one shall be a member of the council unless he resides in the province for which he is appointed or elected, is a duly registered member of the medical profession according to the law of the province which he represents, and (except the original members of the council) is duly registered as a medical practitioner in the register established under this act. No province shall be represented upon the council by appointed or elected members until the legislature of the province has enacted in effect that registration by the council shall be accepted as equivalent to registration for the like purpose under the laws of the province;[1] when all the provinces shall have so legislated it shall be lawful to appoint and elect in the manner aforesaid the members of the council. If any legislature repeals its legislation

[1] See n. 2, p. 589.

contemplated by this section, no more persons shall be given the right to practise medicine within the jurisdiction of such legislature by reason of their qualification or registration under this act (*ib.*, s. 6).

REGISTRAR.—The council is empowered to appoint a registrar (*ib.*, s. 8).

POWERS OF COUNCIL.—Among the powers of the council are to make regulations not contrary to law or the provisions of this act, for or with reference to the following: Sec. 4, *a*, *b*, *c*, *d*, and *e*, and all fees under the act, and the establishment, maintenance, and effective conduct of examinations for ascertaining whether the candidate possesses the qualifications required, the number, nature, time, and mode of such examinations, the appointment of examiners, the terms upon which matriculation and other certificates from universities, schools, and other medical institutions shall be received as evidence of qualification, the dispensation of candidates from undergoing examinations either wholly or partially, and generally all matters incident to such examinations or necessary or expedient to effect the objects thereof, provided the requirements of any curriculum established by the council shall not at any time be lower than the requirements of the most comprehensive curriculum then established for the like purpose in any province, the standard of examination shall not at any time be lower than the highest standard for the like purpose then established for ascertaining the qualification for registration in any province, the possession of a Canadian university degree alone, or of a certificate of provincial registration founded on such possession obtained subsequent to the time when this act shall become operative under sec. 6, shall not entitle the possessor to be registered under this act, no retroactive effect shall be given to this act, especially as regards persons duly inscribed as students under the laws of any of the provinces of Canada at the time it shall become operative as aforesaid; the recognition of licenses granted by any British, Canadian, colonial, or foreign licensing body or authority; the arranging and bringing into effect of any schemes of reciprocity as to registration with any British, colonial, or foreign medical licensing body or authority; the terms and conditions upon which and the circumstances under which medical practitioners shall be entitled to registration under this act in cases where such medical practi-

tioners are duly registered or licensed under the medical acts of the United Kingdom, or under the laws of any British possession other than Canada, or under the laws of any foreign country, which British possession or foreign country extends reciprocal advantages to Canada; the enrolment and registration of all persons entitled under this act to appear on the register for Canada of medical practitioners, and generally all matters which it is necessary or expedient to provide for or regulate in pursuance of the purposes of this act and in furtherance of its general intention (*ib.*, s. 10, subs. 1).

No regulation made under the authority of this section shall have effect until approved by the governor in council, and such approval shall be conclusive evidence that the regulation was no retroactive effect (*ib.*, s. 10, subs. 2).

Evidence.—A copy of any such regulation certified by the registrar or secretary under his hand and the seal of the council may be received in evidence in any court of justice without proof other than the production of a copy purporting to be so certified (*ib.*, s. 11).

Particular Schools of Medicine.—The council shall enact such regulations as shall secure to practitioners, who under the laws of any province are now (May 15th, 1902) recognized as forming a particular school in the practice of medicine, and to all applicants for registration who desire to be practitioners of such school, rights and privileges not less than those now (May 15th, 1902) possessed by them under the laws of any province, and under the laws of any provincial medical council (*ib*, s. 12.)

Board of Examiners.—At each annual meeting the council shall appoint a board of examiners to be known as "The Medical Council of Canada Examining Board," who shall hold the examinations prescribed by the council subject to the provisions of sec. 12 (*ib.*, s. 13).

Examinations.—The subjects of examination shall be decided by the council, and candidates may elect to be examined in the English or French language. The examinations shall be held only at those centres at which there is a university or college actively engaged in the teaching of medicine and having hospital facilities of not less than one hundred beds (*ib.*, s. 14).

Canadian Medical Register.—The council shall cause to be kept by the registrar under the direction of the council a register, known as "The Canadian Medical Register," in which shall be entered in such manner and with such particulars as the council directs, the names of all persons who have complied with the requirements of this act and with the regulations made by the council respecting registration under this act, and who apply to the registrar to have their names so entered (*ib.*, s. 15).

Qualification.—Every one who passes the examinations prescribed by the council and otherwise complies with all the conditions and regulations requisite for registration as prescribed by this act and by the council shall, upon payment of the fees prescribed in that behalf, be entitled to register as a medical practitioner (*ib.*, s. 16, subs. 1).

Any person who has received a license or certificate of registration previous to the date when this act shall have become operative as aforesaid [see s. 6, subs. 3, and s. 10, subs. (iii.)], and who has been engaged in the active practice of medicine in any one or more provinces of Canada, shall, after six years from the date of such certificate, be entitled to be registered under this act as a medical practitioner, without examination, upon payment of the fees and upon compliance with the other conditions and regulations for such cases prescribed by the council (*ib.*, s. 16, subs. 2).

Any person coming within any of the classes of registered or licensed practitioners to which paragraph (*i*) of section 10 of this act applies shall be entitled to be registered upon complying with the orders and regulations established by the council in that behalf (*ib.*, s. 16, subs. 3).

Corrections of Register.—Any entry in the register may be cancelled or corrected upon the ground of fraud, accident, or mistake (*ib.*, s. 17).

Appeals.—In any case of an application for registration or for correcting or amending any entry upon the register, the applicant, if aggrieved by the decision of the registrar, may appeal to the council. All applications to cancel or strike off entries from the register made adversely to the person whose registration it is desired to affect shall be referred by the registrar to the council, which shall after three months' notice sent by post, prepaid and registered, to the last known address of such person,

who shall have the right to appear by counsel, hear and determine all such applications (*ib.*, s. 18).

ERASURE FROM REGISTER.—If it is made to appear to the council after inquiry that any person registered under this act has been convicted either in any part of his Majesty's possessions or elsewhere of an offence which if committed in Canada would be indictable under *The Criminal Code, 1892*, and its amendments, or that he has been guilty of infamous or disgraceful conduct in a professional respect, then whether such offence has been committed, or such conviction has taken place, or such infamous and disgraceful conduct has occurred either before [1] or after the passing of this act, or either before or after the registration of such person, the council shall, after three months' notice sent by post, prepaid and registered, to the last known address of such person, who shall have the right to appear by counsel, direct the registrar to erase the name of such person from the register, provided, if a person registered under this act has likewise been registered under the laws of any province, and such provincial registration has been cancelled for any of the causes aforesaid by the authority of the medical council for that province, the council shall then without further inquiry direct the registration of such person under this act to be cancelled (*ib.*, s. 19, subs. 1).

The name of any person shall not be erased under this section because of his adopting or refraining to adopt the practice of any particular theory of medicine or surgery, or because of his conviction out of his Majesty's possessions of a political offence against the laws of any foreign country, or because of his conviction for any offence which, though coming within the provisions of this section, is in the opinion of the council, either from the trivial nature of the offence or from the circumstances in which it was committed, insufficient to disqualify a person from being registered under this act (*ib.*, s. 19, subs. 2).

COMMISSION OF ARBITRATION.—Whenever it is made to appear to the governor in council that any of the provisions of this act are not complied with, the governor in council may empower the commission of arbitration to inquire in a summary way into and report to him whether such is the case; and if so,

[1] See Hawker *v.* State, p. 390, n. 1.

to prescribe what remedies are necessary, if any (*ib.*, s. 20, subs. 1).

The governor in council may require the medical council of Canada to adopt the said remedies within such time as he, having regard to the report of the commission, thinks fit to appoint. In default of the council so doing, he may by order in council amend the regulations or make such provision or order as he deems necessary to give effect to the decision of the commission (*ib.*, s. 20, subs. 2).

The commission of arbitration is composed of three members, one appointed by the governor in council, one by the medical council of Canada, and one by the complainant (*ib.*, s. 20, subs. 3).

The commission may compel the attendance of witnesses and examine them under oath, and require the production of books and papers, and shall have such other necessary powers as are conferred upon it by the governor in council for the purposes of inquiry (*ib.*, s. 20, subs. 4).

CONSTRUCTION.—This act shall not be interpreted as authorizing the operation of medical schools, or otherwise giving medical tuition (*ib.*, s. 21).

FEES.—All fees to be required, paid or taken under this act, are subject to regulation of the council (*ib.*, s. 10, *g*).

Under sec. 16, subs. 1 and 2, the applicant for registration must pay the fees prescribed in that behalf (*ib.*, s. 16, subs. 1 and 2).

MANITOBA.

MEDICAL ACT.—The following law is cited as The Medical Act (Rev. Stat. of Man., 1902, c. 111, s. 1).

COLLEGE OF PHYSICIANS AND SURGEONS.—The medical profession is incorporated as "The College of Physicians and Surgeons of Manitoba" (*ib.*, s. 2).

All persons lawfully registered under previous acts or the present act are members of the said college (*ib.*, ss. 3, 4).

COUNCIL.—There is constituted by law a council of the said college composed of representatives selected as provided in the act (*ib.*, ss. 5, 6). The members of the council are chosen as follows:

(*a*) Three members chosen by and from the Manitoba Medical

College (*b*), two members chosen similarly from the members of the corporation of any medical college in the Province of Manitoba that may become affiliated with the University of Manitoba; (*c*) three members by the resident practitioners in each electoral district in Winnipeg for the House of Commons of Canada, and one member by the resident practitioners in each such electoral district in Manitoba outside of Winnipeg (*ib.*, sec. 6, as amd. 1904, 3 and 4 Edw. VII., c. 33, s. 1) [*d* and *e* repealed 1904, c. 33, s. 1]; (*f*) one or more members chosen in a similar manner by the licensed practitioners of homœopathy in the province (*ib.*, s. 6), viz., the homœopathic practitioners licensed and registered under this act are entitled to elect representatives as follows: Until they number more than fifteen, one representative, an additional representative after they number fifteen, another additional representative after they exceed thirty, and so on, one additional representative for every additional fifteen registered homœopathic practitioners in the province (*ib.*, s. 7).

No person is eligible as a member of the council except he be a practitioner licensed under this act; no teacher or lecturer in the above-mentioned college or colleges shall hold a seat in the council except he be elected by the medical college as its representative; no person shall be elected under subsection *c* of section 6 except he be a resident within the territory which he may represent (*ib.*, s. 8).

The law regulates in detail beyond the scope of this abstract the method of conducting the elections, and creating and filling vacancies and settling disputed elections (*ib.*, ss. 9–14, 16, 72, 73). No homœopathic member of the college is allowed to vote for any other than homœopathic candidates or representatives (*ib.*, s. 14).

No member of the college who is in arrears for his annual fees or any part thereof is entitled to vote at the election for members of the council or be eligible for election as a member thereof (*ib.*, s. 15).

The law also contains detailed provisions for the conduct of the council, beyond the scope of this abstract (*ib.*, ss. 18, 24).

Register.—The council is required to appoint a registrar and to cause a register, known as the Manitoba Medical Register, to be kept in which shall be entered the name of every person

registered under this act or under the Consolidated Statutes of Manitoba, chapter 9, and the acts amending the same or any other act of the legislature of Manitoba relating to the medical profession, and of all persons who comply with this act, and with the rules and regulations made or to be made by the council respecting the qualifications of practitioners of medicine, surgery, and midwifery. Only those whose names are inscribed in the book are deemed qualified and licensed to practise medicine, surgery, or midwifery (*ib.*, ss. 17, 25, 26). The register shall at all times be open and subject to inspection by any duly registered practitioner in Manitoba.

QUALIFICATION.—All persons duly registered under existing laws when the revised statutes of 1902 took effect are deemed registered under the present law (*ib.*, s. 28).

The registrar is required immediately upon his appointment to register the name of every person registered under previous acts not already entered or duly erased (*ib.*, s. 29).

Every person who possesses one or more of the following qualifications shall, upon the payment of the fee, to be fixed for each particular class by by-law of the council, be entitled to be registered on the production to the registrar of the document proving such qualification:

(*a*) Persons entitled to be registered at the time of the coming into force of the revised statutes of 1902.

(*b*) Any member of any incorporated college of physicians and surgeons of any province of the Dominion of Canada, or any member of any other incorporated body of medical men in Canada, exercising powers similar to those conferred by this act on the College of Physicians and Surgeons of Manitoba, where, by the laws of the province under which the said incorporated body exists, similar rights to register and to practise medicine are granted to the persons incorporated under this act. Provided the course of studies of such college or other incorporated body at the time such member was admitted thereto was at least equivalent to the requirements for a similar course by the University of Manitoba at the time such members shall seek to be registered (*ib.*, s. 30, subs. *b*, as amd. 1904, 3 and 4 Edw. VII., c. 33, s. 1).

(*c*) Every person mentioned in chapter 48 of Act 49 and 50 Vict. of the Parliament of the United Kingdom.

(*d*) Every graduate in medicine upon examination of the University of Manitoba.

(*e*) Every person who produces to the registrar the certificate under the corporate seal of the University of Manitoba hereinafter provided for (*ib.*, s. 130).

The registrar is required to keep his register correct, and to make from time to time the necessary alterations in the addresses or qualifications of the persons registered (*ib.*, s. 31).

Every person registered who obtains a higher degree or other qualification is entitled to have it inserted in the register in substitution of or in addition to the qualification previously registered, on the payment of such fees as the council may appoint (*ib.*, s. 35).

No qualification is to be entered on the register unless the registrar be satisfied by proper evidence that the person claiming it is entitled thereto. Appeal lies from the registrar's decision to the council (*ib.*, s. 36).

The registrar, if dissatisfied with the evidence adduced, may, subject to appeal to the council, refuse registration until proper evidence is furnished, duly attested by oath or affirmation before a judge of any county court (*ib.*, s. 37).

When there shall have been established, under legislation of the parliament of Canada, a medical register for Canada, under control of a medical council for Canada, in which may be registered, subject to such legislation and the lawful requirements of such medical council, the names of medical and surgical practitioners who have satisfied the requirements for that purpose by way of examination or otherwise of such medical council; then, notwithstanding anything contained in this act, any person duly registered in the said register for Canada as a medical and surgical practitioner shall, without any further or other evidence of qualification, be entitled to be registered in the medical register of this province as a duly qualified medical and surgical practitioner, upon production of a certificate, under the hand of the registrar of the said medical council for Canada, certifying that such person is so duly registered in said medical register for Canada, and satisfactory proof of the identity of such person, and upon payment of such fee as may be prescribed by the medical council of this province in that behalf (*ib.*, s. 85, added 1903 by 3 Edw. VII., c. 23, s. 1).

FRAUDULENT REGISTRATION.—Any entry proved to the satisfaction of the council to have been fraudulently or incorrectly made may be erased from the register by order in writing of the council (*ib.*, s. 39).

If a person procures or causes to be procured his registration by false or fraudulent representations or declarations, verbally or in writing, the registrar may, on the receipt of sufficient evidence of the falsity or fraudulent character, represent the matter to the council, and may on the written order of the president, attested by the seal of the college, erase his name from the register, and cause notice of the fact and cause to be published in the *Manitoba Gazette*, and after such notice has appeared such person shall cease to be a member of the College of Physicians and Surgeons, and to enjoy any privilege enjoyed or conferred by registration at any further time without the express sanction of the council (*ib.*, s. 40).

FORFEITURE OF RIGHTS.—Any registered medical practitioner convicted of felony or misdemeanor before or after the passage of the act or his registration forfeits his right to registration, and by direction of the council his name shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the registrar may refuse registration. If any person registered be judged, after due inquiry by the council, to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the registrar to erase his name (*ib.*, s. 41).

The council may, and upon the application of any three registered medical practitioners shall, cause inquiry to be made into the case of a person liable to have his name erased from the register, under sec. 41 and on proof of such conviction or such infamous or unprofessional conduct shall cause his name to be erased; but no erasure shall be made under secs. 41 or 42 on account of his adopting or refraining from adopting the practice of any particular theory of medicine or surgery, nor on account of conviction for a political offence out of His Majesty's dominions, nor on account of a conviction which ought not in the opinion of the council or committee either from the trivial nature of the offence or from the circumstances under which it was committed to disqualify him from the practice of medicine or surgery (*ib.*, s. 42).

The council may order to be paid, out of funds at their disposal, such costs as to them may seem just, to any person against whom any complaint has been made which, when fully determined, is found to have been frivolous and vexatious (*ib.*, s. 43).

An entry erased by order of the council shall not be again entered except by order of the council or a judge or court of competent jurisdiction (*ib.*, s. 44).

If the council think fit, they may direct the registrar to restore any entry erased, without a fee, or on payment of a fee not exceeding the registration fee, as the council may fix (*ib.*, s. 45).

The council is authorized to ascertain the facts of any case for the exercise of its powers of erasing and restoring by committee of their own body not exceeding five in number, of whom not less than three shall constitute a quorum (*ib.*, s. 46).

A written report of the committee may be acted on as to the facts therein stated for the purpose of the exercise of the said powers by the council (*ib.*).

The act provides in detail for the constitution of and proceedings before such committee (*ib.*, ss. 46 to 51). For proceedings outside of Winnipeg the council may constitute a special committee (*ib.*, s. 48).

No action shall be brought against the council or committee for anything done *bona fide* under the act. Appeal from the decision to erase lies to any judge of the court of King's Bench for Manitoba within six months from the date of the order, and such judge may make such order as to restoration or confirmation of erasure or for further inquiry, and as to costs, as to him may seem right (*ib.*, s. 52).

The procedure on the appeal is regulated by the act (*ib.*, s. 53).

Evidence.[1]—In a trial under this act the burden of proof as to registration is on the person charged (*ib.*, s. 54).

The production of a certificate that the person named is duly registered, certified under the hand of the registrar, for the time being is sufficient evidence of registration, and his signature in the capacity of registrar is *prima facie* evidence that he is registrar without proof of signature or that he is registrar (*ib.*, s. 55).

[1] See n. 1, p. 601.

The registrar is required to print and publish from time to time under the direction of the council a correct register of the names and residences, with medical titles, diplomas, and qualifications conferred by any college or body, with the date thereof, of all persons appearing on the register as existing on the day of publication (*ib.*, s. 56); a copy of such register for the time being purporting to be so printed and published is *prima facie* evidence that the persons specified are registered (*ib.*, s. 57).

In the case of any person whose name does not appear in such copy, a certified copy under the hand of the registrar of the council of the entry of the name of such person on the register is evidence that such person is registered (*ib.*, s. 58). The absence of the name of any person from such copy is *prima facie* evidence that he is not registered (*ib.*, s. 59).

Practitioner's Rights.—Every person registered is entitled according to his qualifications to practise medicine, surgery, or midwifery, or any of them as the case may be, and to demand and recover with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicine or other medical appliances rendered or supplied by him to his patients (*ib.*, s. 60).

Neglect to Register.—A person neglecting or omitting to register is not entitled to the rights and privileges conferred so long as the neglect or omission continues, and is liable to all penalties against unqualified or unregistered practitioners (*ib.*, s. 61).

Unregistered Persons.—It is not lawful for any person not registered to practise medicine,[1] surgery, or midwifery for hire, gain, or hope of reward (*ib.*, s. 62).

[1] Simple massage may not be considered the practice of medicine; electrotherapeutics is a branch of medicine, and one who practises it is not entitled to recover for his services unless he shows that he is a qualified medical practitioner duly licensed and registered as required by the statute. Bergman *v.* Bond, 14 Man., 503 (1904).

Medicine is comprehensive enough to include everything which is to be applied for the purpose of healing, whether externally or internally. (Quoted from Berry *v.* Henderson, L. R. 5 Q. B., 296.) Bergman *v.* Bond, 14 Man., 503 (1904).

Selling a patent medicine or specific for the treatment after inquiry into the nature of the complaint and its symptoms, is practising medicine, if the selection of the remedy is made by the seller. Regina *v.* Barnfield, 3 Can. Cr. Cas., 161, cited in Bergman *v.* Bond, 14 Man., 503 (1904).

The treatment of a patient with electricity for the purpose of either alleviating or curing a disease is practising medicine under the act. Bergman *v.* Bond, 14 Man., 503 (1904).

No person is entitled to recover any charge for medical or surgical advice or attendance, or the performance of any operation, or for any medicine which he may have prescribed or supplied, unless he be registered under this act,[1] but this provision does not extend to the sale of any drug or medicine by a duly licensed chemist or druggist (*ib.*, s. 63).

No person shall be appointed as a medical officer, physician, or surgeon in the public service, or in any hospital or other charitable institution not supported wholly by voluntary contribution, unless he be registered under this act (*ib.*, s. 64).

No certificate required from any physician or surgeon or medical practitioner is valid unless the signer be registered (*ib.*, s. 64).

DEFINITION.—The expression "legally qualified medical practitioner," or any other words or expression importing legal recognition as a medical practitioner or member of the medical profession, in any law, is construed to mean a person registered under this act (*ib.*, s. 66).

IMMUNITIES.—A person registered under this act is exempt from jury and inquest duty if he desire it (*ib.*, s. 67).

LIMITATIONS.—No duly registered member of the College of Physicians and Surgeons is liable in an action for negligence or malpractice by reason of professional services requested or rendered, unless it be commenced within one year from the termination of such service (*ib.*, s. 68).

EXAMINATIONS.—The University of Manitoba is the sole examining body in medicine, and the council of the university may grant to any person a certificate under the seal of the university that the council of the university have been satisfied that the person mentioned in the certificate is, by way of medical education and otherwise, a proper person to be registered under this act; but such certificate shall not be granted until the person making such application shall have given evidence of qualification by undergoing an examination or otherwise, as the statutes of the university may require, and the applicant shall in all other respects first comply with the rules and regulations of the university in that behalf (*ib.*, s. 69).

Employing massage is not administering medicine. The general term *medicine* does not include massage. Bergman *v.* Bond, 14 Man., 503 (1904), citing Regina *v.* Valleau, 3 Can. Cr. Cas., 435.

[1] See n. 1, p. 601.

HOMŒOPATHISTS.—Until a homœopathic medical college for teaching purposes is established in Manitoba, in the cases of candidates wishing to be registered as homœopathists, the full time of attendance upon lectures and hospitals required by the university statutes may be spent in such homœopathic medical colleges in the United States or Europe as may be recognized by the University of Manitoba (*ib.*, s. 70).

Every candidate who at the time of his examination signifies his wish to be registered as a homœopathic practitioner shall not be required to pass an examination in materia medica or therapeutics, or theory or practice of physic, or in surgery or midwifery, except the operative practical parts thereof, before any examiners other than those homœopathic examiners who shall be appointed by the University of Manitoba (*ib.*, s. 71).

UNLAWFUL PRACTICES.—If the registrar make or cause to be made any wilful falsification in any matter relating to the register, he shall incur a penalty of $50 and shall be disqualified from again holding that position (*ib.*, s. 38).

To wilfully procure or attempt to procure one's self to be registered under this act by false or fraudulent representation or declaration is punishable by a penalty not exceeding $100. To knowingly aid or assist therein is punishable by a penalty of from $20 to $50 for each offence (*ib.*, s. 74).

Persons not registered, for hire, gain, or the hope of reward, practising or professing to practise medicine, surgery, or midwifery, or advertising to give advice in medicine, surgery, or midwifery, are liable to a penalty of from $25 to $100 (*ib.*, s. 75).

A person wilfully or falsely pretending to be a physician, doctor of medicine, surgeon, or general practitioner, or assuming a title, addition, or description other than he actually possesses and is legally entitled to, is liable to a penalty of from $10 to $50 (*ib.*, s. 76).

For a person not registered pursuant to this act to assume a title implying or calculated to lead people to infer that he is registered under this act, or is recognized by law as a physician, surgeon, or accoucheur or a licentiate in medicine, surgery, or midwifery, is punishable with a penalty of from $25 to $100 (*ib.*, s. 77).

On prosecution, costs may be awarded in addition to the pen-

alty, and the offender may be committed to the common jail for one month, unless the penalty and costs are sooner paid (*ib.*, s. 79).

PROSECUTIONS are conducted under the Manitoba summary convictions act (*ib.*, s. 80).

PROSECUTOR.—Any person may be prosecutor or complainant under the act (*ib.*, s. 81).

LIMITATIONS.—Prosecutions are limited to commence within six months after the date of the offence (*ib.*, s. 82).

APPEAL.—A person convicted under this act, giving notice of appeal, must before being released give satisfactory security for the penalty and costs of conviction and appeal (*ib.*, s. 83).

STAY.—The council may stay proceedings in prosecutions (*ib.*, s. 85).

FEES.—The council is authorized to determine by by-law an annual fee, which is required to be paid by each member of the college—the fee can be not less than $2 nor more than $5, is payable on January 1st, and may be recovered with cost of the suit as a debt by the college in the county court of the judicial division in which the member resides (*ib.*, s. 32).

The fee for registration is subject to regulation by the council (*ib.*, s. 34). Those registered under sec. 85, *supra*, pay such fee as may be prescribed by the medical council of this province in that behalf (*ib.*, s. 85, added 1903 by 3 Edw. VII., c. 23, s. 1).

FEES—LIBRARY AT WINNIPEG.—With a view to secure $250 per annum from members of the college resident at Winnipeg, for partial maintenance of a library which the council may establish and maintain at the city of Winnipeg, the council is required to fix a fee to be charged and collected from each member of the college resident in Winnipeg and applying for the privileges of the library (not to exceed $20 per member), may fix the date in each year for the payment, and make regulations as to the effect of default in payment and for renewal of the privileges of the library after default (*ib.*, s. 17).

NEW BRUNSWICK.

MEDICAL ACT.—Chapter 73 of the Consolidated Statutes of New Brunswick of 1903, is cited as "The New Brunswick Medical Act" (Cons. Stats., 1903, c. 73, s. 1).

MEDICAL SOCIETY.—All persons qualified to register and registered under the chapter constitute the New Brunswick Medical Society (*ib.*, s. 2).

COUNCIL.—There is a medical council called the Council of Physicians and Surgeons of New Brunswick, of nine legally qualified medical practitioners, of not less than seven years' standing; four are nominated and appointed by the governor in council, and five by the New Brunswick Medical Society (*ib.*, ss. 3, 5).

The secretary of the council is the registrar (*ib.*, s. 7).

REGISTER—EVIDENCE.—The registrar is required before May 1st annually to print and publish in the *Royal Gazette* of the province, and such other manner as the council shall appoint, a correct register of the names and residences and medical titles, diplomas, and qualifications conferred by any college or body, with the dates thereof, of all persons appearing on the register on the 1st of January. The register is called the Medical Register; a copy for the time being purporting to be so printed and published, or a certificate signed by the president of the council, and attested by the registrar with the corporate seal of the council, is *prima facie* evidence that the persons therein specified are registered and qualified; the absence of a name from such copy or the want of such certificate is *prima facie* evidence that such person is not registered. If a name does not appear on the copy, a certified copy, under the hand of the registrar of the council, of the entry of a name on the register, is evidence of registration (*ib.*, s. 8).

ENTRANCE UPON STUDY.—A person beginning or entering on the study of physic, surgery, or midwifery, for the purpose of qualifying to practise in the province, must have obtained from the council a certificate that he has satisfactorily passed a matriculation or preliminary examination in the subjects enumerated in the act, unless he has passed a matriculation examination for an under-graduate course in arts and science at some college in Great Britain, Ireland, Canada, the United States of America or the continent of Europe, or holds a first-class teacher's license, from the board of education of New Brunswick (*ib.*, s. 10).

[The list of subjects and qualifications for the matriculation or preliminary examination above mentioned will be found in

Schedule B, annexed to chapter 73 of the Consolidated Statutes of 1903, the council has power to alter these subjects (*ib.* s. 10)].

The act prescribes formalities for admission to such preliminary examination (*ib.*, s. 11).

QUALIFICATION.—Subject to the exceptions hereinafter, no person can lawfully practise physic, surgery, or midwifery unless he be registered, or unless he shall have received from the council a license to practise (*ib.*, s. 12).

No person is entitled to registration or license unless he shall satisfy the council that he has passed the matriculation or preliminary examination; that after passing such examination he has followed his studies for not less than four years; that during such four years he has attended at some university, college, or incorporated school of medicine in good standing, a graded collegiate course of four sessions of not less than six months each; such course to include satisfactory and sufficient lectures and instruction in anatomy, practical anatomy, chemistry, practical chemistry, physiology, histology, materia medica, pharmacy, therapeutics, surgery, medicine, obstetrics, diseases of women and children, medical jurisprudence, hygiene, and pathology, including bacteriology, together with evidence of attending for a period of not less than twelve months upon the general practice of a hospital containing not less than fifty beds, under the charge of not less than two physicians or surgeons; that previous to graduation or obtaining a diploma he has passed satisfactory examinations in the subjects of the above curriculum, and that the examinations have been conducted and the diploma granted by a medical school, college, university, or licensing body which itself requires a four years' graded course as above appointed, or for want of such degree or diploma that he has satisfactorily passed an examination in the various branches herinbefore specified before the examiners appointed by the council; and in case he has such degree or diploma, that he has passed such examination as to his knowledge and skill for the efficient practice of his profession as may be prescribed by the council; that he is not less than twenty-one years of age; that he has paid to the registrar of the council a fee of ten dollars. The council has power, subject to the approval of the lieutenant-governor in council, to make such alterations as may be required in the foregoing curriculum and requirements for registration as may from time to time

be deemed requisite. If any person apply for registration as a practitioner of any system of medicine, the registered practitioners of the system have the right to appoint an examiner or examiners on the subjects peculiar to that system, viz., materia medica, pharmacy, and therapeutics, and if they neglect so to do the council has the power to appoint such examiner or examiners (*ib.*, s. 13).

The last preceding section does not apply to persons in actual practice entitled to register under section 43 and to receive a license to practice under chapter on payment of $2. Any person producing to the council conclusive evidence that he has passed a matriculation or a preliminary examination, as required by this chapter for persons beginning medical studies in New Brunswick, that he has before graduating or taking a diploma studied at least four years as provided in section 13, or pursued what the council deem an equivalent course of study and has passed a final examination in the subjects of such course, or, for the want of such requisites, shall have fulfilled such conditions as the council may determine, and shall pay a fee of ten dollars, shall be entitled to registration and to receive a license to practise (*ib.*, s. 14).

Residents of the province who began the study of medicine in a *bona fide* manner before January 1st, 1881, and who were at that time residents of the province, shall for the purpose of registration produce approved credentials of their qualification for registry and shall pay a fee of $5 (*ib.*, s. 15).[1]

Examining Body of Other Province.—When and so soon as it appears that there has been established an examining body similar to that provided by this chapter or an institution duly recognized by the legislature of any of the Provinces of the Dominion of Canada other than the Province of New Brunswick,

[1] In an action against a registrar for wrongfully and injuriously refusing to register the plaintiff, the declaration is demurrable if it does not also allege that the refusal was malicious or with intent to injure. Peterson *v.* Harding, 4 Allen (N. B.), 583 (1860).

The duties of the registrar are partly ministerial and partly judicial; he must exercise his judgment to satisfy himself as to the evidence offered as entitling the applicant to be registered; he is not liable for an error of judgment unless malicious. Peterson *v.* Harding, 4 Allen (N. B.), 583 (1860).

To constitute a right of action against the registrar for refusing to register, it is necessary to aver that proper evidence of the plaintiff's title to registry was tendered; the mere production of such diploma is not sufficient evidence of the authority to grant it. Peterson *v.* Harding, 4 Allen (N. B.), 583 (1860).

as the sole examining body for the purpose of granting certificates of qualification, and wherein the curriculum is equal to that provided in section 13 of this chapter, or as the same may be at any time altered in accordance with the provisions of said section 13, the holder of any such certificate shall, upon due proof, be entitled to registration by the said council, if the same privilege is accorded in such other Province to those registered in New Brunswick (*ib.*, s. 16).

Central Examining Board.—The Council of Physicians and Surgeons of New Brunswick has power to establish, conjointly with any council or board incorporated under any act of the legislature of any province of Canada or of the Northwest Territories, and possessing powers similar to those conferred on the board by this chapter, a central examining board, and to delegate to such board all powers possessed by the council respecting the examination of candidates for admission to practise medicine, surgery, and midwifery; provided that such powers be not exercised unless the persons passing any examination of such central examining board shall, on complying with the laws and rules of the respective councils or boards in each such province or in the Northwest Territories, be entitled to registration as legally qualified practitioners in the Provinces or Territories, whose councils or boards may have conjointly with the said council of New Brunswick established such central board; provided, further, that any examination conducted by such central board shall be held at least in one place within this Province simultaneously with such examinations held in any of the said other Provinces or in the Northwest Territories; provided that the aforegoing provisions of this section shall not become operative unless and until a similar provision is in force in at least three other Provinces of Canada (of which the Northwest Territories may be considered as one), and such central board shall not have or exercise any powers under this chapter unless it is representative of at least four of said Provinces (*ib.*, s. 17).

Duties of Council.—The council is empowered and required (among other duties not within the scope of this abstract) to regulate the study of medicine, surgery, and midwifery, with regard to preliminary qualifications, course of study, final examination, and the evidence to be produced before the council; to appoint a registration committee of one or more of its members

to examine all degrees, diplomas, licenses, and other credentials presented or given in evidence under the chapter to enable the owner to practise in New Brunswick, and to oblige the owner to attest on oath or affidavit that he is the person whose name is mentioned therein, and that he became possessed thereof properly and honestly; to cause every member of the profession practising in New Brunswick to register in the register of the council his name, age, place of residence, place of nativity, date of license or diploma, and the place where he obtained it; to appoint medical examiners, who may be members of the council, to hold final examinations, who shall be regularly qualified practitioners of not less than five years' professional standing and three years' residence in the province, and to fix fees for such examination not exceeding $10 (*ib.*, s. 18).

Correction of Register.—The registrar is required to erase the names of all registered persons who shall have died, left the province without any intention of returning, or ceased to practise for five years; and from time to time to make the necessary alterations in the addresses or qualifications of registered persons. Any name erased shall be restored by the order of the council on sufficient cause duly shown (*ib.*, s. 21).

Neglect to Register.—Persons entitled to registration, neglecting or omitting to register, are not entitled to any rights or privileges conferred by the chapter so long as such neglect or omission continues (*ib.*, s. 22).

System of Practice.—No person otherwise qualified under this chapter shall be refused registration or license on account of his adoption or refusal to adopt the practice of any particular theory of medicine or surgery. In case of refusal the aggrieved party may appeal to the lieutenant governor-in-council, who is required, on due cause shown, to issue an order to the council to register his name and grant him a license to practise, and thereupon the council shall forthwith register his name and grant him a license to practise (*ib.*, s. 23).

Evidence of Qualification—Fraudulent Registration.—No qualification can be entered unless the registrar be satisfied [1] by proper evidence that the person claiming it is entitled to it. An appeal may be made from the registrar's decision to the council. Any entry proved to the satisfaction of the

[1] See n. 1, p. 607.

council to have been fraudulently or incorrectly made, may be erased by the order in writing of the council, and the name of such person fraudulently registering, or attempting to register, may, at the discretion of the council, be published in the next issue of the *Royal Gazette* (*ib.*, s. 21).

FORFEITURE OF RIGHT.—A registered medical practitioner convicted of felony of any crime punishable by imprisonment in a penitentiary although a less penalty be imposed by the court, or after due inquiry judged by the council to have been guilty of infamous conduct in any professional respect thereby, subject to appeal to the lieutenant governor-in-council, forfeits his right to registration, and by the direction of the council his name shall be erased from the register (*ib.*, s. 25).

The time and place of inquiry under the foregoing section must be fixed by the council, and at least fourteen days' notice given to the party against whom inquiry is ordered (*ib.*, s. 25, subd. 2, c. 82, s. 6).

The chapter regulates the procedure on such inquiry (*ib.*, s. 25, subd. 3, 4, 5).

ADDITIONAL QUALIFICATIONS.—Every person registered who may obtain a higher degree or other qualification is entitled to have it registered in substitution for, or in addition to, the qualifications previously registered, on the payment of such fee as the council may demand (Act 1881, c. 19, s. 26).

PRACTITIONER'S RIGHTS.[1]—Every person registered under the chapter is entitled according to his qualifications to practise medicine, surgery, midwifery, or dentistry, or either or any of them as the case may be, and to demand and recover reasonable and customary charges for professional aid, advice, and visits, and the cost of any medicine or other medical or surgical appliances rendered or supplied by him to his patients (*ib.*, s. 27).

[1] In Peterson *v.* Harding, 4 Allen (N. B.), 583 (1860), in a declaration against the registrar for unlawfully refusing registration (overruled on demurrer on other grounds), the rights secured by registration are enumerated as follows: to become a member of the medical faculty of New Brunswick, to become a member of the Medical Council, to recover in courts of law for medical or surgical advice or attendance or the performance of an operation, to be eligible to appointment as physician, surgeon, or other medical officer in any hospital, lunatic asylum, jail, house of correction, or other public establishment, body, or institution, or any friendly or other society for affording medical relief in sickness or infirmity, or medical officer of health for an insurance company, and entitled to use the name or title of doctor of medicine.

No person is entitled to recover any such charge for any medical or surgical advice or for attendance or for the performance of any operation or for any medicine which he shall have both prescribed and supplied unless he shall prove upon the trial that he is registered under this chapter (*ib.*, s. 28).[1]

DEFINITION.—The words "legally qualified medical practitioner," or "duly qualified medical practitioner," or other words implying that a person is recognized by law as a medical practitioner or member of the medical profession, when used in a legislative act or a legal or public document mean a person registered under this chapter (*ib.*, s. 29).

UNREGISTERED PERSONS.[2]—No person shall be appointed a medical officer, physician, or surgeon in the public service or in any hospital or other charitable institution unless registered under this chapter (*ib.*, s. 30).

No certificate required from any physician or surgeon or medical practitioner is valid unless the signer be duly registered under this chapter (*ib.*, s. 31).

A person not registered or licensed under this chapter, or not actually employed as a physician or surgeon in His Majesty's naval or military service, practising physic, surgery, or midwifery for hire, gain, or hope of reward, forfeits twenty dollars for each day upon which he so practises (*ib.*, s. 32).

OFFENCE BY REGISTRAR.—If the registrar make or cause to be made any wilful falsification in any matters relating to the register, he shall forfeit not less than $100 (*ib.*, s. 33).

FRAUDULENT REGISTRATION.—Wilfully procuring or attempting to procure one's self to be registered under this chapter by making or producing, or causing to be made or produced, any false or fraudulent representation or declaration, verbally or in writing or aiding or assisting therein, is punishable with a forfeiture of not less than $100 (*ib.*, s. 34).

Any person wilfully and falsely pretending to be or taking or using any name, title, addition, or description implying he is

[1] An affidavit to obtain a capias for arrest for services performed and medicines supplied by plaintiff as physician, surgeon, and apothecary is insufficient where it does not allege that the plaintiff was a duly registered physician. Turner *v.* Connelly (York Co.), 35 Can. L. J., 540 (1899).

[2] A physician's practice may be the subject of a sale; and one who is not registered, but who is entitled to register, may make a valid contract to sell his practice. Ryan *v.* McNichol, 1 New Br. Eq., 487 (1897), see n. 1, p. 610.

registered under this chapter is punishable with a forfeiture of from $50 to $100 (*ib.*, s. 35).

The sum forfeited is recoverable with costs. The procedure in reference to all penalties is regulated by Chapter 123.

Any information for the recovery of any such penalty or forfeiture may be laid by any member of the New Brunswick Medical Society, or by any person appointed by the council (*ib.*, s. 37).

Upon the trial of any information for an offence against sec. 32 or sec. 35, the burden of proof as to the license or right of the defendant to practise physic, surgery, or midwifery in New Brunswick, or that he is registered under this chapter, or any amendment thereof, as the case may be, shall be upon the defendant (*ib.*, s. 38).

Any sum forfeited under sec. 32 or 35, and recovered, belongs to the council; but where the information leading to such recovery is given by a person unconnected with the medical profession, such person shall be entitled to receive one-half of the sum recovered (*ib.*, s. 39).

Limitations.—No prosecution can be commenced for any offence against this chapter after one year from the date of the offence (s. 40).

Exceptions.—The chapter does not prevent persons from giving the necessary medical or surgical aid or attendance to any one in urgent need of it, provided it be not for hire or gain, and the giving of it be not made a business or way of gaining a livelihood; nor does it prevent any woman from giving the necessary aid in cases of confinement as heretofore accustomed (*ib.*, s. 41).

Persons Entitled to Registration.—All persons practising medicine, surgery, or midwifery in the province at the time of the passing of the New Brunswick Medical Act, 1881, and who shall have previously obtained a degree or diploma in medicine or surgery from any legally chartered medical college or university in any country where such is recognized, and all persons who immediately before the coming into force of this chapter were entitled to be registered on the medical register, and all persons who shall subsequently to the passing of this chapter (July 1st, 1904) fulfil the requirements by this chapter provided as conditions precedent to registration, and all persons who shall have practised medicine or surgery in the province

for a period of twenty years previous to the passing of the New Brunswick Medical Act, 1881, shall be entitled to registry and receive a license to practise under the chapter (*ib.*, s. 43).

PHYSICIANS IN ARMY OR NAVY.—A person while employed in actual service in His Majesty's naval or military service as physician or surgeon may practise physic, surgery, or midwifery without any registry or license (*ib.*, s. 44).

NON-RESIDENTS.—Non-resident regular practitioners of medicine residing in the State of Maine or in the Province of Quebec or Nova Scotia near the boundary line of this Province, whose regular practice extends into any town, parish, or county in New Brunswick, may register under the chapter (*ib.*, s. 48).

No non-resident practitioner of medicine except those mentioned in this chapter is entitled to register (*ib.*, s. 48).

MALPRACTICE.—No duly registered member of the New Brunswick Medical Society shall be liable to any action for negligence or malpractice by reason of professional services requested or rendered, unless such action be commenced within one year from the date when in the matter complained of such professional services terminated (*ib.*, s. 49).

CLAIRVOYANTS.—The act does not extend to clairvoyant physicians practising prior to March 25, 1881 (*ib.* s. 50).

STUDENTS.—The act establishes a uniform standard of matriculation or preliminary examinations (*ib.*, Sched. B).

FEES.—To the registrar, for registration under sections 13 and 14, $10 (*ib.*, ss. 12, 13).

To the registrar, for the registration of an additional or substitute qualification, such fee as the council may demand from a person in actual practice entitled to register under sec. 43, for license to practise under this chapter, $2 (*ib.*, s. 14); from a former practitioner entitled to register under sec. 15, $5 (*ib.*, s. 15); the council is empowered to fix fees for examination, not exceeding $10 (*ib.*, s. 18, subd. 8).

Each registered medical practitioner must, if required by the council, pay to the registrar, or a person deputed by him, an annual fee determined by the council, not less than $1 nor more than $2, payable January 1st each year and recoverable as a debt with costs in the name of the council (*ib.*, s. 9).

If any registered practitioner omit to pay the annual fee before the registrar causes the register to be printed in the *Royal*

Gazette, the registrar shall not cause the name of such practitioner to be printed, and he shall thereupon cease to be deemed a registered practitioner; but afterward, on paying such fee, he shall be entitled to all his rights and privileges as a registered practitioner from the time of payment (*ib.*).

Newfoundland.

Medical Board.—There is a board composed of seven persons named in the act and their successors, and known as "The Newfoundland Medical Board" (Act 1896, c. 9, s. 1).

Vacancies are filled by the registered medical practitioners of Newfoundland in such manner and subject to such rules as may be made by the board (*ib.*, s. 3).

All registered medical practitioners are entitled to vote at any such election (*ib.*, s. 3).

The board consists of seven members, four of whom are required to be resident medical practitioners resident in St. John's (*ib.*, s. 5).

The board is authorized at its annual meeting to appoint examiners and fix times of examinations (*ib.*, s. 4).

The secretary of the board, elected from the members of the board, is the registrar (*ib.*, s. 6).

The board is authorized to make rules, not inconsistent with this act, respecting, among other matters, the conduct of examinations and the granting of certificates upon matriculation, the registration of members, the fees for registration, certificates, licenses, and examinations, fixing the amount of fees, and inquiry by the board into complaints against persons charged with an offence under section 23, and the mode of procedure thereon (*ib.*, s. 7), and such other rules, subject to the approval of the governor in council, as they may deem necessary to carry into effect the purposes of the act (*ib.*, s. 8).

Matriculation Examination.—No person shall enter on the study of medicine, surgery, or midwifery, unless he shall have obtained from the board a certificate that he satisfactorily passed a matriculation or preliminary examination on the subject [s] in Schedule A [annexed to the act "Uniform Standard of Matriculation or Preliminary Examination Established under this Act] (*ib.*, s. 9). No candidate is admitted to such exami-

nation, unless at least fourteen days previous to the examination, he give notice to the registrar of his intention to present himself for the examination and pay to the registrar before the examination the fee prescribed by the board (*ib.*, s. 10).

REGISTER—EVIDENCE.—The board is required to cause a book or register to be kept by the registrar, in which is entered the name of every person registered, according to the provisions of this act, with his residence, his medical titles, diplomas, and qualifications conferred by any college or body, and the dates thereof (*ib.*, s. 11).

It is the duty of the registrar, on or before January 15th in each year, to cause to be published in the *Royal Gazette* a copy of the register containing the names in alphabetical order according to the surnames of all persons appearing on the register at that date (*ib.*, s. 12).

Such register is called The Newfoundland Medical Register, and a copy thereof for the time being is *prima facie* evidence that the persons therein specified are registered according to the act; and the absence of a name therefrom is *prima facie* evidence that such person is not so registered (*ib.*, s. 13).

The registrar is required to enter upon the register the names of all persons registered under the Act of 56 Vict., c. 12 (Newfoundland Medical Act, 1893), without fee (s. 14).

QUALIFICATION.—Every person is entitled to have his name entered on the register on satisfying the board that he holds a medical degree or diploma from some regular university or school of medicine in good standing, having a four years' course of study, and that he has, prior to obtaining such degree, passed a preliminary or matriculation examination satisfactory to the board, on the payment to the registrar of the fee prescribed by the board (*ib.*, s. 15).

No qualification shall be entered on the register, on first registration or by way of addition to a registered name, unless the registrar is satisfied by proper evidence that the person claiming such qualification is entitled to it. Any appeal from the registrar is decided by the board (*ib.*, s. 16).

EXPUNGING.—Any entry proved to the satisfaction of the board to have been fraudulently or incorrectly made may be erased from the register by order of the board (*ib.*, s. 17).

Every registered medical practitioner is required to take out

from the registrar, before the 10th of January in every year, a certificate to practise, for which he shall pay the fee prescribed by the board. The fee is a debt due by each registered medical practitioner to the board, recoverable with costs in the name of the board before any stipendiary magistrate or justice of the peace (*ib.*, s. 19).

Neglect to Register.—A person entitled to be registered under the act, who neglects or omits to take out the certificate under section 19, is not entitled to any of the rights or privileges conferred by registration so long as the neglect or omission continues, and is liable to all the penalties imposed by the act on unqualified or unregistered practitioners (*ib.*, s. 21).

New Degree.—A person registered under this act who obtains a higher degree or diploma is entitled to have it inserted in the register in addition to or in substitution for that previously inserted (*ib.*, s. 18).

Rights of Registered Persons.—Every person properly registered under the act, who has taken out the certificate prescribed by section 19, is entitled to practise medicine, surgery, and midwifery in any part of the colony, and to demand and recover in any court reasonable charges for professional aid or advice, with the cost of any medicine or other medical and surgical appliance supplied by him (*ib.*, s. 20).[1]

Limited Licenses.—The board may, after examination, grant to any person, not otherwise qualified or entitled to registration under this act, a license to practise medicine, surgery, or midwifery for a limited period in specified localities. The names of such licensees, together with the period for and the locality in which they may practise, shall be entered in the register and published as provided for registered medical practitioners. Such licensee shall pay the fee prescribed by the board and shall thereupon be entitled to demand and recover in any court reasonable charges for aid and advice, together with the cost of any medicine or other medical or surgical appliances supplied by him during the period and within the limits of his license (*ib.*, s. 22).

Discipline.—Whenever a medical practitioner or licensee registered under the act has been or may be found by the board, after due inquiry by a committee of their number or otherwise,

[1] See n. 1, p. 628.

guilty of professional misconduct or malpractice or of conduct unbecoming a practitioner, the board may resolve that he is unworthy to practise medicine, surgery, or midwifery in this colony, and strike his name off the books and the register, either absolutely or for a limited period, and thereupon all his rights and privileges shall thenceforth cease and determine, either absolutely or for such period. Such practitioner or licensee may appeal to the Supreme Court, as provided in the act, within fourteen days after the passing of the resolution; if such appeal is not so taken or prosecuted at the next sittings of the Supreme Court, the board's resolution stands confirmed (*ib.*, s. 23).

Unregistered Persons.—No person is entitled to recover in any court any charge for any medical or surgical advice, or for attendance or the performance of any operation, or for any medicine which he may have prescribed and supplied, unless he is registered under this act and shall have for the current year taken out the certificate provided in section 19 or the license provided in section 22 (*ib.*, s. 27).

It is not lawful for any person, not registered, to practise medicine, surgery, or midwifery for hire, gain, or hope of reward (*ib.*, s. 24).

Offences and Penalties.—If a person not registered pursuant to the act practises or professes to practise medicine, surgery, or midwifery, or advertises to give advice or gives advice in medicine, surgery, or midwifery, for hire, gain, or hope of reward, he is subject, on conviction in a summary manner before a justice of the peace, to a penalty not exceeding $50, and in default to imprisonment for not exceeding six months (*ib.*, s. 24).

Any person who wilfully or falsely pretends to be a physician, doctor of medicine, surgeon, or medical practitioner, or assumes any title or addition or description other than he actually possesses or is entitled to, is liable, on conviction in a summary manner before a stipendiary magistrate or justice of the peace, to a penalty not exceeding $50, or, in default of payment, to imprisonment not exceeding three months (*ib.*, s. 25).

Any person not registered pursuant to this act, who takes or uses any name, title, addition, or description implying or calculated to lead people to infer that he is registered under this act or that he is recognized by law as a physician, surgeon, accoucheur, or a licentiate in medicine, surgery, or midwifery, is liable,

on conviction in a summary manner before a stipendiary magistrate or justice of the peace, to a penalty not exceeding $50, or, in default of payment, to imprisonment not exceeding six months (*ib.*, s. 26).

If the registrar shall wilfully cause any name to be placed on the register not in accordance with the provisions of this act, he shall forfeit $100 and be removed from his office by the board (*ib.*, s. 34).

Burden of Proof.—In any trial or prosecution under the act the burden of proof is upon the person charged (*ib.*, s. 28).

Prosecutions—Penalties.—All penalties recovered under the act are to be paid to the registrar and form part of the funds of the board. Any person may be prosecutor or complainant under the act, and the board may allot such portion of the penalties recovered as may be expedient toward the payment of such prosecutor (*ib.*, s. 29).

Exceptions.—Nothing in the act prevents private persons from giving necessary medical or surgical aid in times of urgent need, provided such aid is not given for gain or hire (*ib.*, s. 32).

Any person while employed in actual service in any naval or military service as physician or surgeon may practise medicine, surgery, or midwifery after having been registered (*ib.*, s. 31).

Definition.—The words "legally qualified medical practitioner," or "duly qualified medical practitioner," or any other words importing a person recognized by law as a medical practitioner or member of the medical profession, when used in any act of the legislature or legal or public document, shall be construed to mean a person registered under this act (*ib.*, s. 35).

Medical Appointments.—No person shall be appointed as a medical officer, physician, or surgeon in any branch of the public service or in any hospital or other charitable institution unless he be registered under this act (*ib.*, s. 30).

Midwives.—Nothing in the act prevents females from practising midwifery (*ib.*, s. 33).

Fees.—For registration, certificates, licenses, and examinations are regulated by the board (*ib.*, ss. 7, 15, 19, 22).

All persons registered under the Newfoundland Medical Act, 1893, are to be registered without fee (*ib.*, s. 14).

Northwest Territories.[1]

College of Physicians and Surgeons.—The members of the medical profession who constituted the corporation named below upon the coming into effect of this ordinance, and all persons hereafter registered members of said college under the provisions of this ordinance, are a body corporate under the name of "The College of Physicians and Surgeons of the Northwest Territories" (Cons. Ordin. of 1898, c. 52, s. 2).

Council.—There is a council of said college consisting of five members appointed by the persons registered as medical practitioners who have paid their fees to the council, from the persons entitled to vote and registered in pursuance of this ordinance (*ib.*, ss. 3, 4, 5).

The method of voting is regulated in detail in the ordinance (*ib.*, ss. 8–22, as amd. Ord. 1903, c. 12, ss. 1, 2).

The council appoints among other officers a registrar (*ib.*, s. 23), and an executive committee to take cognizance of and action upon all such matters as may be delegated to it by the council or as may require immediate interference or attention between the adjournment of the council and its next meeting; all such acts shall be valid only till the next ensuing meeting of the council; but the committee has no power to alter, repeal, or suspend any by-law of the council (*ib.*, s. 24).

Register—Qualification.—The council is required to cause the registrar to keep a register of the names of all persons registered under this ordinance, and from time to time the names of all persons who have complied with its enactments and with the rules and regulations of the council respecting the qualifications required from practitioners of medicine or surgery. Only those persons whose names are inscribed in the register are deemed qualified and licensed to practise medicine or surgery, except as hereinafter provided (*ib.*, s. 27).

The register is at all times required to be open and subject to inspection by any person (*ib.*).

The registrar is required to keep his register correct and to make the necessary alterations in the addresses or qualifications of persons registered (*ib.*, s. 28).

[1] See n. 1, p. 620. See Alberta, Appendix, p. 707.

The council is required to admit on the register:

(*a*) Any person possessing a diploma from any college in Great Britain and Ireland (having power to grant such diploma) entitling him to practise medicine or surgery, and who shall produce such diploma and furnish satisfactory evidence of identification;

(*b*) Any member of any incorporated college of physicians and surgeons of any Province of the Dominion of Canada exercising powers similar to those conferred by this ordinance upon the College of Physicians and Surgeons of the Northwest Territories (amended c. 15, 1900).

(*c*) Any person who shall produce from any college or school of medicine and surgery recognized by the council of the College of Physicians and Surgeons of the Northwest Territories a certificate or certificates that he has taken a four years' course of lectures and a diploma of qualification from such recognized college or school; provided he furnish to the council satisfactory evidence of identification, and pass, before the members thereof, or such examiners as may be appointed for the purpose, a satisfactory examination touching his fitness and capacity to practise as a physician and surgeon, upon payment to the registrar of $50 toward paying the expenses of the examining board (*ib.*, s. 29, as amended c. 15, 1900).

Whenever there is established under the act of the Parliament of Canada known as the Canada Medical Act, 1902, or any act in amendment thereof, a register for Canada of medical practitioners, under the control of a medical council appointed or elected pursuant to the provisions of said act or acts, then, notwithstanding anything in this ordinance contained, any person duly registered in said medical register for Canada as a medical and surgical practitioner shall be deemed qualified and entitled to be registered in the Medical Register of the Northwest Territories as a duly qualified medical and surgical practitioner, and such person and no other[1] shall be registered, and such registration shall be made upon production of a certificate under the hand of the registrar of the said Medical Council for Canada, certifying that such person is duly registered in the said Medical

[1] The literal effect of this expression "*and no other*" would be to make qualification under the Canada Medical Act, 1902, the sole qualification, after the establishment thereunder of a register for Canada under said act. Query: Whether it was designed to have this effect?

Register for Canada, and upon satisfactory proof of the identity of such person; provided that such person may be required to pay such fee for such registration in the Territories as the Medical Council for the Territories may impose in that behalf, and provided that the provisions of this section shall not apply to or affect any person duly registered under the said ordinance at the time the Canada Medical Act, 1902, becomes operative (Ord. 1903, c. 12, s. 4).

Powers of Council.—The council may by by-law delegate to the registrar power to admit to practise and to register any person having the necessary qualifications entitling him to be registered by such council (*ib.*, s. 31).

The council shall from time to time make orders, regulations, or by-laws for the regulation of the register and the guidance of examiners, and may prescribe subjects and modes of examination, and may make all such rules and regulations in respect of examinations, not contrary to the ordinance, that they may deem expedient and necessary (*ib.*, s. 35).

The council may also make, alter, amend, and repeal rules and regulations, among other things, for the well-being and discipline of the council and the promotion of medical and surgical knowledge (*ib.*, s. 36).

The council may at any time direct the name of any person improperly registered to be erased from the register, and such name shall be erased by the registrar (*ib.*, s. 32).

Central Examining Board.—The council has power to establish, conjointly with the council or councils of any college or colleges of physicians and surgeons incorporated under any act of the legislature of any province of Canada and possessing powers similar to those conferred on the College of Physicians and Surgeons of the Northwest Territories, a central examining board, and to delegate to such board all powers possessed by the said council respecting the examination of candidates for admission to practise medicine and surgery; provided that such power shall not be exercised unless the persons passing any examination of such central examining board shall, on complying with the laws and rules of the respective councils in other respects, be entitled to registration as legally qualified medical practitioners in the provinces whose councils may have, conjointly with the said council, established such central examining board; provided

that any examinations conducted by such central examining board shall be held in at least one place within the Territories simultaneously with such examinations held in any province (*ib.*, s. 37).

Forfeiture of Rights.—If any medical practitioner be convicted of any indictable offence or after due inquiry be judged by the council to have been guilty of infamous conduct in any professional respect, the council may, if it sees fit, direct the registrar to erase the name of such practitioner from the register, and the name shall be erased (*ib.*, s. 38).

The council may, and on the application of any three registered medical practitioners shall, cause inquiry to be made into the case of a person alleged to be liable to have his name erased under the preceding section, and on proof of such conviction or infamous or unprofessional conduct shall cause the name of such person to be erased from the register; provided the name of a person shall not be erased on account of his adopting or refraining from adopting the practice of any particular theory of medicine or surgery, nor on account of a conviction for a political offence out of Her Majesty's dominion, nor on account of a conviction for an offence which, though within the provisions of section 38, ought not, in the opinion of the council or the committee hereinafter named, either from the trivial nature of the offence or from the circumstances under which it was committed, to disqualify a person from practising medicine or surgery (*ib.*, s. 39).

The council may order to be paid out of funds at their disposal such costs as they may deem just to a person against whom a frivolous and vexatious complaint has been made (*ib.*, s. 40).

Where the council direct the erasure from the register of a name or other entry, it shall not be again entered except by direction of the council or order of a judge of the Supreme Court (*ib.*, s. 41).

The council may in any case direct the restoration of a name or entry erased, with or without fee, not exceeding the registration fee (*ib.*, s. 42).

The law provides for a committee of inquiry respecting such erasure and restoration, and regulates in detail its constitution and procedure and appeal from the decision of the council thereon (*ib.*, ss. 43 to 50).

Rights of Registered Persons.—Every person registered

under the ordinance is entitled to practise medicine and surgery, including midwifery, or any one of them, and to demand and recover with costs reasonable charges for professional aid, advice, and visits, and the cost of medicine or surgical appliances rendered or supplied by him to his patients (*ib.*, s. 51).

LIMITATION.—A period of one year after the termination of professional service requested or rendered is established as a limitation to actions for negligence or malpractice against duly registered members of the college (*ib.*, s. 52).

REGISTER—EVIDENCE.—The registrar, under the direction of the council, is required from time to time at least annually to publish a correct register of the names and residences and the medical titles, diplomas, and qualifications conferred by any college or body, of all persons appearing on the register on the day of publication. The register is called "Northwest Territories' Medical Register," and a copy for the time being, purporting to be so printed and published, is *prima facie* evidence in all Territorial courts that the persons therein specified are registered according to the ordinance. The absence of a name from such copy is (subject to subsection 2) *prima facie* evidence that such person is not so registered (*ib.*, s. 57).

In case a person's name does not appear on such copy, a certified copy under the hand of the registrar of the entry of the name of such person on the register is evidence that such person is so registered (*ib.*, s. 57 [2]).

NEGLECT TO REGISTER.—A person entitled to be registered and neglecting or omitting to register is not entitled to any of the rights or privileges conferred, so long as the neglect or omission continues, and is liable to all penalties against unqualified or unregistered practitioners (*ib.*, s. 59).

OFFENCES AND PENALTIES.—No unregistered person shall practise medicine or surgery for hire or hope of reward. To practise or profess to practise medicine or surgery without registration, for hire, gain, or hope of reward, is punishable with a penalty not exceeding $100 (*ib.*, s. 60).

To wilfully or falsely pretend to be a physician, doctor of medicine, surgeon, or general practitioner, or to assume any title, addition or description not actually possessed and to which the person is not legally entitled under this ordinance, is punishable with a penalty of from $10 to $50 (*ib.*, 61).

Without being registered under this ordinance, to take or use any name, title, addition, or description implying or calculated to lead people to infer registration or recognition by law as a physician, surgeon, or licentiate in medicine or surgery is punishable with a penalty of from $25 to $100 (*ib.*, s. 62).

Prosecutions may be brought or heard before a justice of the peace, who, in case the penalty and costs are not forthwith paid on conviction, may commit the offender to the common jail for not exceeding one month unless sooner paid (*ib.*, s. 63).

Unregistered Persons.—No person is entitled to recover any charge for any medical or surgical advice or attendance or the performance of any operation or medicine which he may have prescribed (*ib.*, s. 53); nor to be appointed as medical officer, physician, or surgeon in any branch of the public service or in any hospital or other charitable institution not supported wholly by voluntary contributions, unless registered under this ordinance (*ib.*, s. 54).

No certificate required by any ordinance from any physician or surgeon or medical practitioner is valid unless the signer is registered under this ordinance (*ib.*, s. 55).

Burden of Proof.—In prosecutions under this ordinance, the burden of proof of registration is upon the person charged (*ib.*, s. 64).

Proof.—The production of a printed or other copy of the register, or of any extract therefrom certified by the registrar, is sufficient evidence of registration; a certificate purporting to be signed by any person in his capacity of registrar of the council under this ordinance is *prima facie* evidence that he is registrar without proof of his signature or of his being in fact registrar (*ib.*, s. 58).

Limitation of Prosecutions. — Prosecutions must be commenced within six months from the date of the alleged offence (*ib.*, s. 65).

Stay.—The council may by order signed by the president having the seal of the council appended, stay proceedings in prosecutions under this ordinance where deemed expedient (*ib.*, s. 66).

Definition.—"Legally qualified medical practitioner" or "duly qualified medical practitioner," or any other words implying legal recognition as a medical practitioner or member of the

medical profession, when used in any ordinance or law so far as they apply to the Territories, mean a person registered under this ordinance (*ib.*, s. 56).

HOMŒOPATHISTS.—Homœopathic physicians may be registered under this ordinance on complying with the terms of section 29 (*ib.*, s. 30).

FEES.—To the registrar or his deputy from each member annually as the council may determine by by-law, not exceeding $2 payable January 1st each year, deemed a debt due by each member of the college, recoverable with costs of suit in the name of the college; but the council may remit any annual fees of any member resident out of the Territories during the period, in respect of which the fees become due (*ib.*, s. 34, as amd. Ord. 1903, c. 12, s. 3).

From practitioner registered under sec. 4 of ch. 12 of Ord. 1903 (above), such fee for registration in the Territories as the Medical Council may impose in that behalf (Ord. 1903, c. 12, s. 4).

To the registrar, from every applicant for examination $50 (*ib.*, s. 29).

To the registrar for registration under any section of this ordinance $50 (*ib.*, s. 33).

NOVA SCOTIA.[1]

MEDICAL BOARD.[2]—There is a Provincial Medical Board consisting of thirteen qualified medical practitioners of not less than seven years' standing, seven appointed by the governor in council, and six elected by the Medical Society of Nova Scotia (R. S., 1900, c. 103, s. 3). This board is a body corporate (*ib.*, s. 4).

The board appoints a secretary who is required to be a qualified medical practitioner, resident at Halifax, and who is the registrar of the board (*ib.*, ss. 8, 9), and who is required to keep his

[1] The statute is a municipal regulation confined in its operation to Nova Scotia. Wilmot *v.* Shaw, 14 Nova Scotia, 2 R. & G., 343; 2 C. L. T., 96. The whole scope of the act relates to the practice of the profession in the province; the remedy sought to be effected by the act does not in any way relate to actions upon contracts or for services between parties residing abroad, whose transactions are to be governed by the law of the country where the services were performed. Wilmot *v.* Shaw, 14 Nova Scotia, 2 R. & G., 343; 2 C. L. T., 96.

[2] The board is a corporation and may sue in its own name for the penalties. Provincial Medical Board *v.* Washington, 19 Nova Sc., 7 R. & G., 470; 8 C. L. T., 16.

registers according to the provisions of this chapter and the regulations and by-laws of the board (*ib.*, s. 15).

Powers of the Board.—Among the powers of the board are the following relating to the study and admission to the practice of medicine, etc.: to regulate the study of medicine by making rules not inconsistent with this chapter in respect to preliminary qualifications, the course of study, professional examinations, and the nature of the evidence to be produced before the board with respect thereto; to appoint persons to conduct preliminary and professional examinations: to decide on times and places for holding examinations, and the remuneration to be paid to examiners; to examine all degrees, diplomas, licenses, and other credentials presented in support of applications for registration and require from the applicant a statement on oath that he is the person whose name is mentioned in such credentials and became possessed thereof honestly; to cause every medical practitioner in the province to enter in a register of the board to be kept by the registrar and to be called the medical register, his name, age, place of residence, the date of his license, diploma, or certificate of qualification, and the institution or authority conferring it; to cause every person engaged in the study of medicine for the purpose of qualifying to practise, to enter in a register of the board, to be kept by the register, and to be called the medical students' register, his name, age, place of residence, date and particulars of his preliminary examination, and place and date of his commencement of the study of medicine; to cause every midwife in the city of Halifax to enter in a register of the board, to be kept by the registrar, and to be called the midwives' register, her name, place of residence, and age, as well as her license or certificate, or the nature of her qualification or authority to practise as a midwife; to make regulations and by-laws concerning the registers, and for bringing this chapter into effect (which may be disallowed by the governor in council) (*ib.*, s. 13).

Register—Evidence.—The registrar is required before the 1st of August each year to cause to be printed and published in the *Royal Gazette* of the province, and in such other manner as the board appoints, a correct list in alphabetical order according to the surnames with the residences and medical titles, diplomas, and qualifications, with the dates thereof of all persons appearing on the register as existing on June 30th in such year: and a

list purporting to be so printed and published, is from August 1st to the same date in the following year, *prima facie* evidence in all courts of justice that the persons specified are registered according to this chapter. The absence of a name from such list is during the same period *prima facie* evidence that such person is not so registered. In the case of a person whose name does not appear in such list, a certified copy, under the hand of the registrar, of the entry of his name on the register is evidence that such person is registered under the provisions of this chapter (*ib.*, s. 32).

STUDENTS.—No person can begin or enter on the study of medicine for the purpose of qualifying himself to practise in the province unless he first produces to the registrar a certificate from the examiners appointed by the board to show that he has passed the preliminary examination in the subjects prescribed by the rules and regulations of the board or evidence of having passed such equivalent examination [*as?*] is accepted by the board, and unless he causes his name forthwith to be entered in the medical students' register, and for such registration has paid such fees as the board appoints (*ib.*, s. 16). No candidate is admitted to the preliminary examination unless at least fourteen days previous thereto he has given notice to the registrar of his intention to present himself for such examination, and unless he has produced to the registrar satisfactory evidence that he has completed his sixteenth year and has paid a fee of $10 to the registrar (*ib.*, s. 17).

EXAMINERS.—There are two professional examiners in each subject with respect to which a professional examination is required; no more than one member of the teaching faculty of any medical school or college shall be appointed examiner in any one subject (*ib.*, s. 18).

QUALIFICATION.—Subject to the exceptions in this chapter every person shall be entitled to have his name entered on the medical register who produces satisfactory evidence to the board that he has passed the preliminary examination, or equivalent examination provided by this chapter, and had his name entered in the medical students' register; that after such examination and registration he has followed his studies during a period not less than four years; that during such four years he has attended at some university, college, or incorporated school of medicine in

good standing, a graded collegiate course of four sessions of not less than eight months each, such course to include satisfactory and sufficient lectures and instruction in anatomy, practical anatomy, physics, chemistry, practical chemistry, physiology, histology, materia medica, pharmacy, therapeutics, surgery, clinical surgery, medicine, clinical medicine, obstetrics, practical obstetrics, diseases of women and children, medical jurisprudence, hygiene, pathology (including bacteriology and post-mortem examinations), and that he has attended the general practice of a hospital in which are not less than one hundred beds under the charge of not less than four recognized medical practitioners of whom at least one must be a surgeon for a period of not less than twenty-four months, that he has satisfactorily passed an examination in the various branches hereinbefore specified before the professional examiners appointed under the provisions of this chapter, and has received from the board its certificate of qualification; provided that any candidate who at the time of his examination intimates his intention to practise the system of homœopathy, shall not be required to pass an examination in either materia medica, or therapeutics, or in the theory or practice of medicine, or in surgery or midwifery except the operative practical parts thereof, before any examiners other than homœopathic examiners, who shall be appointed by the board; that he is not less than twenty-one years of age; and that he has paid the registrar such fee as the board by general by-law appoints (*ib.*, s. 19). The foregoing curriculum and regulations shall be compulsory only in the case of persons who began the study of medicine subsequent to July 1st, 1899 (*ib.*, s. 19).

The board has power, subject to the approval of the governor in council, to make from time to time such alterations in the same as are required (*ib.*, s. 19).

The last preceding section does not apply to any person in actual practice duly registered under chapter 56 of Revised Statutes, 3d series; such persons are entitled to be registered under this chapter without fee (*ib.*, s. 20).[1] The board is required to admit to registration on payment of the registration fee any per-

[1] A physician practising in Newfoundland, who performed medical services in Newfoundland for a person resident there, may recover therefor in Nova Scotia, in an action instituted against the person who employed him. Wilmot *v.* Shaw, 14 Nova Scotia, 2 R. & G., 343; 2 C. L. T., 96 (1881). See n. 1, p. 625.

son desirous of practising in Nova Scotia who is duly registered by the General Medical Council of Great Britain (*ib.*, s. 21, sub. s. 1).

When it appears that there has been established in any other province of Canada, or in the Northwest Territories of Canada, an examining board similar to that constituted by this chapter, or an institution duly recognized by the legislature of any such province or said Territories, as the sole examining body therein for the purpose of granting certificates of qualification for the practice of medicine, and whereof the curriculum is equivalent to that established by this chapter, the holder of a certificate of qualification therefrom shall on due proof and upon payment of the registration fee, be entitled to registration by the board if the same privilege is accorded by such examining board or institution to those holding certificates of qualification from the board (*ib.*, s. 21, sub. s. 2, as amd., Act 1903, c. 63, s. 2).

Whenever there is established under the act of the Parliament of Canada known as "The Canada Medical Act, 1902," or any act in amendment thereof, a register for Canada of medical practitioners under the control of a medical council appointed or elected pursuant to the provisions of said act or acts, then, notwithstanding anything contained in this chapter, any person duly registered in said medical register for Canada as a medical and surgical practitioner shall be deemed to be qualified and entitled to be registered in the medical register of the board as a duly qualified medical and surgical practitioner, and shall be so registered upon the production of a certificate under the hand of the registrar of said medical council for Canada, certifying that such person is duly registered in said medical register for Canada, and upon satisfactory proof of the identity of such person, and upon payment of such fee as may be prescribed by the board, not exceeding the fee ordinarily payable in cases of registration under the other provisions of this chapter (*ib.*, s. 21, s. s. 3, added c. 63, Acts 1903).

Unregistered Persons.—No person shall practise medicine, surgery, or midwifery in Nova Scotia unless his name is registered in the medical register (*ib.*, s. 22).

No person shall be appointed as medical officer, physician, or surgeon in any branch of the public service of this province, or in any hospital or other charitable institution, unless he is registered under the provisions of this chapter (*ib.*, s. 23).

No certificate required by any statute from any physician, surgeon, or medical practitioner shall be valid unless the person granting or signing the same is registered under this chapter (*ib.*, s. 24).

No person is entitled to recover in any court of law any charge for medical or surgical advice or attendance, or for the performance of any operation, or for medicines or medical or surgical appliances which he has supplied or furnished unless he proves upon the trial that he is registered under this chapter.[1] (This does not apply to the sale by qualified druggists or chemists of articles properly belonging to their business [*ib.*, s. 25]).[2]

Neglect to Register.—Any person neglecting or omitting to be registered is not entitled to any of the rights or privileges conferred (*ib.*, s. 31).

Theories of Medicine or Surgery.—No person otherwise duly qualified shall be refused registration on account of his adoption or refusal to adopt the practice of any particular theory of medicine. In case of such refusal by the board the person aggrieved has the right to appeal to the governor in council, who, on due cause shown, may issue an order to the board to register the name of such person (*ib.*, s. 26).

Evidence for Registration.—No qualification is entered either on the first registration or by way of addition unless the board is satisfied by sufficient evidence that the person claiming is entitled, and any entry proved to the satisfaction of the board to have been fraudulently or incorrectly made shall by direction of the board be erased from the register (*ib.*, s. 28).

Forfeiture of Rights.—Any medical practitioner sentenced to imprisonment in a penitentiary or, after due inquiry, judged by the board to have been guilty of infamous conduct in any professional respect, thereby forfeits his right to registration, and if registered his name shall, by the direction of the board, be erased from the register (*ib.*, s. 25).

Additional Qualifications.—Every person registered under this chapter, who has obtained any degree or qualification other than that with respect to which he has been registered, may

[1] See n. 1, p. 628.

[2] Though a court may not allow its power to be exercised to protect a quack remedy, it will not apply this rule to an emulsion of cod-liver oil which the evidence shows is prescribed by many physicians to their patients. Irish *v.* Puttner, 19 Nova Sc., 7 R. & G., 405.

have such other degree or qualification inserted in the register in substitution for or in addition to the qualification previously registered, on the payment of such fee as the board appoints (*ib.*, s. 27).

Rights of Registered Persons.—Every person registered under the provisions of this chapter is entitled according to his qualification or qualifications to practise medicine, surgery, or midwifery, or any of them as the case may be, and to demand and receive in any court of justice reasonable charges for professional aid, advice, and attendance[1] and the cost of any medicines or any medical or surgical appliances furnished by him to his patients (*ib.*, s. 30).

Definition.—The expression "qualified medical practitioner" or any other words importing a person recognized by law as a medical practitioner or a member of the medical profession, when used in this chapter, unless the context otherwise requires, means a person registered under this chapter (*ib.*, s. 2).

Offences and Penalties.—If a person not registered practises, or in any manner or by any means whatsoever professes to practise[2] medicine, surgery, or midwifery for hire, gain, or hope of reward, or advertises in any manner or by any means whatsoever to give advice in medicine, surgery, or midwifery, he is liable to a penalty, not exceeding $20 for each day that he so practises, professes to practise, or advertises (*ib.*, s. 35 [1]). If any person wilfully pretends to be a physician, doctor of medicine, surgeon, or general practitioner, or assumes any title, addition, or description other than he actually possesses and is legally entitled to, he is liable for each offence to a penalty not exceeding $100 (*ib.*, s. 35 [2]). Every person not registered under this chapter, who takes or uses any name, title, addition, or description, implying or calculated to lead people to infer that he is registered under this chapter,[3] or that he is recognized

[1] The house surgeon of a hospital (in the absence of a by-law prohibiting him from charging patients) is entitled to recover on an implied assumpsit for services rendered to a patient able to pay, who resorted to the hospital for better attendance. Farrell *v.* McLaren, 2 Nova Sc. L. R., 3 R. & C., 75.

[2] The law imposes a penalty for an unregistered person professing to practise, or leading people to infer that he is qualified to practise. Provincial Medical Board *v.* Washington, 19 Nova Sc., 7 R. & G., 470; 8 C. L. T., 16 (1886) (Wetherbe, J., dissenting).

[3] An unregistered person who has a diploma as an M.D. is entitled to use the title, but not by advertisement or in such a way as to lead people to infer that he was registered. Provin-

by law as a physician, surgeon, or accoucheur, or as a licentiate in medicine, surgery, or midwifery, is liable for each offence to a penalty not exceeding $100 (*ib.*, s. 36).

All penalties and forfeitures are recoverable with costs, in the same manner as a private debt by the board [1] or any qualified medical practitioner in any court having jurisdiction of actions of debt to the extent of $80 or upward. Such recoveries belong to the board (*ib.*, s. 37).

On trials under this chapter the burden of proof of due registration is on the person charged, and in absence of proof that he is so registered it is conclusively presumed against him that he is not so registered under this chapter (*ib.*, s. 38).

If a person wilfully procures or attempts to procure himself to be registered by making or producing any false or fraudulent representation, statement, or declaration verbally or in writing, he, and every person knowingly aiding or assisting therein, are each liable to a penalty of not less than $100 (*ib.*, s. 33).

If the registrar makes or causes to be made any wilful falsification in any matter relating to either of the registers he is liable to a penalty of not less than $100 (*ib.*, s. 34).

No suit or action for recovery of any penalty under this chapter shall be commenced after one year from the date of the offence or act complained of (*ib.*, s. 39).

Exceptions.—This chapter does not prevent a competent female from practising midwifery in Nova Scotia, except in the city of Halifax. In the city of Halifax no female shall practise midwifery unless and until she first fulfils such conditions as the board by regulation or by-law appoints, and satisfies the examiners appointed by the board for that purpose of her competency, and obtains from the board a diploma or certificate of qualification and has been registered as hereinbefore provided.

In lieu of an examination the board may accept from any such midwife practising or proposing to practise in the city of Halifax a diploma or certificate from a recognized lying-in hospital which provides a regular course of instruction and requires an examination equivalent to that required by the board (*ib.*, s. 40).

Nothing in the chapter prevents any person from giving nec-

cial Medical Board *v.* Washington, 19 Nova Sc., 7 R. & G., 470; 8 C. L. T., 16 (1886).

[1] See n. 2, p. 625.

essary medical or surgical aid or attendance to any one in urgent need of it, provided such aid or attendance is not given for hire or gain, nor the giving of it made a business or way of gaining a livelihood (*ib.*, s. 41).

Any person who before July 1st, 1899, commenced the study of medicine for the purpose of qualifying himself to practise the same, and who complied, before July 1st, 1902, with the conditions and provisions of Rev. Stat., 5th series, c. 25, and its amendments and the rules and regulations thereunder in force at the time of the passage of this chapter (Act 1899, c. 32, s. 39 [2]) is entitled to registration under this chapter (*ib.*, s. 42).

Fees.—For registration under sections 16, 19, 21, 27, such fee as the board appoints (*ib.*, ss. 16, 19, 27). The fee under sec. 21, sub. s. 3 (above), is not to exceed the fee ordinarily payable in case of registration under the other provisions of this chapter (*ib.*, s. 21, sub. s. 3, as added, Act 1903, c. 63, s. 1).

To the registrar, for a preliminary examination under section 17, $10 (*ib.*, s. 17).

Persons entitled to registration under section 20 are registered without fee (*ib.*, s. 20).

Ontario.[1]

College of Physicians and Surgeons.—There is a corpo-

[1] On the relative rights and powers of the Imperial parliament, the dominion government, and the provincial legislatures respecting medical laws, see Regina *v.* Coll. of Phys. & Surg., 44 Up. Can. Q. B., 564; 1 Cartwr. Cas. on Br. N. Am. Act, 761 (1879).

Canada is included in the meaning of *Colony* in the British Medical Act, 31 Vict., c. 29, May 29, 1868 (see pp. 542 *et seq*). Regina *v.* Coll. of Phys., 1 Cartwr. Cas. on Br. N. Am. Act, 761; 44 Up. Can. Q. B., 564. See Appendix, p. 706.

Act 1904, c. 107, empowers Owen B. Van Epp, a practitioner qualified to practise medicine in Ohio, upon production of certain evidences of his qualification, to be registered under the Ontario Medical Act as a practitioner of medicine, surgery, and midwifery within the limits of the township of Pelee, in the county of Essex, only. The act is of interest because it shows that the township is an island in Lake Erie, that there are over two hundred inhabitants, that it has been impossible to procure a qualified practitioner under the laws of Ontario to take up his residence there, and that communication with the mainland is interrupted a large part of the year, and the lives of the inhabitants are endangered, by this condition; that the medical council refuses to register him without examination (which it may be inferred he declined to submit to), and that the municipal council approves of this act, and the whole adult population has requested Dr. Van Epp to remain upon the island and practise his profession there. The act is cited here because it is the first instance found by the author of the operation of the medical acts in depriving a whole community of medical assistance. See also n. 1, p. 661.

ration styled "The College of Physicians and Surgeons of Ontario" (Rev. Stat., 1897, c. 176, s. 2).

All persons registered according to the provincial acts 29 Victoria, c. 34, 32 Victoria, c. 45, and 37 Victoria, c. 30, Rev. Stat. Ont., 1877, 54 Victoria, 27, and amendatory and consolidating acts, are members of said corporation (*ib.*, s. 3), as well as all persons registered under this act (*ib.*, s. 4).

Council.—There is a council of said college composed of representatives chosen, one member from each university, college, or body, following, to wit, the University of Toronto, the Queen's University and College of Kingston, the University of Victoria College, the University of Trinity College, the Royal College of Physicians and Surgeons, Kingston, the Toronto School of Medicine, Trinity Medical School, the Ottawa University, Regiopolis College, the Western University, and every other university, college, or body in the province now or hereafter authorized by law to grant degrees in medicine and surgery, and which establishes and maintains to the satisfaction of the College of Physicians and Surgeons of Ontario a medical faculty in connection therewith, with five members elected by the registered licensed practitioners in homœopathy, and seventeen members elected from among and by the other registered members of the profession (*ib.*, s. 6). No teacher, professor, or lecturer of any such bodies shall hold a seat in said council except as a representative of the body to which he belongs (*ib.*, s. 6, subd. 2).

All members of the council representing the bodies aforesaid must be practitioners duly registered (*ib.*, s. 6, subd. 3). The seventeen members to be elected shall be residents of the several territorial divisions for which they are elected; any member who during the term for which he was elected, ceases to reside in the division for which he was elected, thereby vacates his office as such member (*ib.*, s. 6, subd. 4). The members are elected from the territorial divisions enumerated in the act (*ib.*, s. 6, subd. 5, and schedule A). The act provides in detail the method of filling vacancies in the council (*ib.*, s. 7).

All duly registered practitioners are entitled to vote at any election for members of the council (*ib.*, s. 8). (Act 1902, c. 12, s. 21, has provisions respecting next election after March 17, 1902.)

Any member of the college may have his name transferred from one class of voters to any other on presenting to the registrar a certificate duly signed by the member or members of the board of examiners to examine candidates on subjects specified as peculiar to each school of medicine, testifying that the member so applying has shown a sufficient knowledge of the system of medicine he desires to connect himself with to entitle him to be admitted to the class he desires, and being so admitted he is entitled to vote in that class only (*ib.*, s. 9 [1]).

No member is entitled to return to the class from which he has been transferred without the sanction of the council; no member is entitled to vote in more than one class (*ib.*, s. 9 [2]).

The council appoints officers including a registrar (*ib.*, s. 14).

The council must appoint annually from among its members an executive committee to take cognizance of and action upon all matters delegated to it by the council or which may require immediate interference or attention between the adjournment of the council and its next meeting, and all such acts shall be valid only till the next ensuing meeting of the council; but the committee has no power to alter, repeal, or suspend any by-law of the council (*ib.*, s. 15).

Territorial Division Association.—In each territorial division established by the act there may be established a Division Association, of which every member of the said college residing within the said territorial division shall be a member (*ib.*, s. 16).

Medical Education.—The council has power to appoint an examiner or examiners for the admission of all students to the matriculation or preliminary examination, and to make by-laws and regulations for determining the admission and enrolment of students. Any change in the curriculum of studies fixed by the council shall not come into effect until one year after such change is made (*ib.*, s. 17 [1]).

Until a homœopathic medical college for teaching is established in Ontario, candidates wishing to be registered as homœopathists must pass the matriculation examination established by this act as the preliminary examination for all students in medicine, and present evidence of having spent the full period of study required by the curriculum of the council under the super-

vision of a duly registered homœopathic practitioner (*ib.*, s. 17 [2]).

Such candidates must also have complied with the full curriculum of studies prescribed from time to time by the council for all medical students; but the full time of attendance on lectures and hospitals required by the curriculum of the council may be spent in such homœopathic medical colleges in the United States or Europe as may be recognized by a majority of the homœopathic members of the council; but in all homœopathic colleges where the winter course of lectures is only of four months' duration, certified tickets of attendance on one such course is equivalent to two-thirds of one six-months' course, as required by the council. When such teaching body shall be established in Ontario it shall be optional for such candidates to pursue in part or in full the required curriculum in Ontario (*ib.*, s. 17 [3]).

The council shall from time to time, as it may deem expedient, enact by-laws as to the terms on which it will receive matriculation and other certificates of colleges and other institutions not in the Province of Ontario (*ib.*, s. 18).

Graduates in arts in any university in her Majesty's Dominion are not required to pass the preliminary examination where the council adopts a lower standard for matriculation than graduation in arts. Such standard shall conform to the curriculum of the universities in the province for the academic year to which such standard applies, or to the course of study prescribed for junior or senior matriculation in arts, or to the examinations prescribed by the Department of Education for the leaving examinations of high schools (*ib.*, s. 19).

The council has power from time to time to fix a curriculum of studies to be pursued by students, and such curriculum shall be observed and taught by all bodies referred to in section 6 (*ib.*, s. 20).

Registration.—In a register kept by the registrar is required to be entered the name of every person duly registered and from time to time all persons who have complied with the act [1] and the rules and regulations made by the council [2] respecting

[1] See n. 1, p. 633.

[2] The Imperial Medical Act is controlling in its effect, and one entitled to registration in a colony, by reason of the provisions of Imperial Act 31 Vict., c. 29 (May 29, 1868, see *supra*, p. 542 *et seq.*), is entitled to registration in Ontario without examination.

the qualifications of practitioners of medicine, surgery, and midwifery; and those persons only whose names are inscribed in the register shall be deemed to be qualified and licensed to practise medicine, surgery, or midwifery, except as hereinafter provided. Such book shall at all times be open and subject to inspection by any person (*ib.*, s. 21).

The registrar is required to keep his register correct and to erase the names of persons who have died, and to make the necessary alterations in the addresses or qualifications of persons registered. And he may write to any registered person at his address on the register, to inquire whether he has ceased to practise or has changed his residence, and if no answer be returned within six months, may erase the name of such person; the name shall be restored on compliance with the other provisions of the act (*ib.*, s. 22).

It is optional [1] for the council to admit to registration all such persons as are duly registered in the medical register of Great Britain, or otherwise authorized to practise medicine, surgery, and midwifery in the United Kingdom of Great Britain and Ireland,[2] upon such terms as the council may deem expedient (*ib.*, s. 23 [1]).

Any person actually practising medicine, surgery, or midwifery, or any of them, in Ontario prior to January 1st, 1850, and who has attended one course of lectures at any recognized medical school, on such proof as the council may require, is entitled to register (*ib.*, s. 23 [2]).

Any person actually practising medicine, surgery, or midwifery according to the principles of homœopathy before January 1st, 1850, and for the six years preceding March 24th, 1874, in Ontario, may in the discretion of the representatives of the homœopathic system of medicine be registered (*ib.*, s. 23 [3]).

Any legally qualified medical practitioner according to the laws of Manitoba, who was residing and practising in the territory now (1891?) constituting the Rainy River District at and

Whether the provincial legislature could impose discriminating fees is not decided. Regina *v.* Coll. of Phys., 1 Cartw. Cas. on Br. N. Am. Act, 761; 44 Up. Can. Q. B., 564.

A practitioner registered in Great Britain is not entitled to practise in this province until registered under the provincial act, and he cannot, unless so registered, maintain an action for slander in his profession against one who calls him a quack. 31 Up. Can. C. P., 423 (1880).

[1] See n. 2, p. 636.

[2] See n. 1, p. 633.

before the order of Her Majesty in council with respect to the westerly boundary of this province, and who on May 4th, 1894, still resided in the said district, shall upon production of a certificate of qualification to practise medicine, surgery and midwifery from the College of Physicians and Surgeons of Manitoba, be entitled to be registered as a practitioner of medicine, surgery, and midwifery in the said district without payment of fees or examination, but subject to the other conditions and regulations applicable to the medical profession in Ontario (*ib.*, s. 23 [4]).

Any person who possesses any of the qualifications described in Schedule B, attained prior to July 23d, 1870, on the payment of a fee to be fixed by by-law of the council, not exceeding $10, is entitled to register on producing to the registrar the document conferring or evidencing his qualification or qualifications in respect whereof he seeks to be registered, or on transmitting by post to the registrar information of his name and address and evidence of the qualification or qualifications in respect whereof he wishes to be registered, and of the time or times at which the same was or were attained. No one registered under the acts mentioned in section 3 is liable to pay for registration (*ib.*, s. 24).

Every person wishing to be registered, and not possessed before July 23d, 1870, of one of the qualifications in Schedule B, must present himself for examination as to his knowledge and skill for the efficient practice of his profession before the board of examiners mentioned in section 28, and upon passing the examination required and proving to the satisfaction of the board of examiners that he has complied with the rules and regulations of the council, and on payment of such fees as the council may by general by-law establish, he shall be entitled to register and in virtue of his registration to practise medicine, surgery, and midwifery (*ib.*, s. 25).[1]

Central Examining Board.—When it appears that there has been established a central examining board similar to that constituted by this act, or an institution duly recognized by the legislature of any of the other provinces of the Dominion of Canada as the sole examining body for the purpose of granting certificates of qualification, and wherein the curriculum is equal to that established in Ontario, the holder of any such certificate shall, upon due proof, be entitled to registration by the council of Ontario if the same privilege is accorded by such examining

[1] See n. 1, p. 633.

board or institution to those holding certificates in Ontario (*ib.*, s. 26).

Board of Examiners.—The council is required at its annual meeting to elect a board of examiners whose duty it is to examine at least once in each year all candidates for registration in accordance with the by-laws, rules, and regulations of the council; such examinations are to be held at Toronto or Kingston at such times and in such manner as the council may by by-laws direct (*ib.*, s. 27).

The board of examiners is composed of one member from each existing teaching body enumerated in section 6 and one from every other school of medicine organized in connection with any university or college empowered by law to grant medical or surgical diplomas and not less than six members chosen from the members of the College of Physicians and Surgeons of Ontario unconnected with any such teaching body (*ib.*, s. 28).

Homœopathists.—A candidate who, at the time of the examination, signifies his wish to be registered as a homœopathic practitioner shall not be required to pass an examination in materia medica or therapeutics, or the theory or practice of physic or in surgery or midwifery except the operative parts thereof, before any examiners other than those approved of by the representatives in the council of the homœopathic system (*ib.*, s. 29).

Duties of Council.—The council is required to make orders, regulations, or by-laws for regulating the register and fees for registration and for the guidance of the board of examiners, and may prescribe the subjects and modes of examinations and the time and place of holding the same, and may make all such rules and regulations in respect of such examinations not contrary to the act as they deem expedient and necessary (*ib.*, s. 30).

Additional Qualification.—Every person registered who obtains a higher degree or other qualification is, on the payment of the fee, entitled to have it inscribed in the register in substitution for or in addition to the qualifications previously registered (*ib.*, s. 31).

Powers of Registrar.—No qualification is to be entered on the register on first registration or by way of addition unless the registrar be satisfied by proper evidence that the person claiming it is entitled to it. Appeal from the decision of the registrar may be decided by the council; any entry proved to

the satisfaction of the council to have been fraudulently or incorrectly made may be erased from the register by order of the council in writing (*ib.*, s. 32 [1]).

If the registrar be dissatisfied with the evidence adduced by a person claiming to be registered, he has power, subject to appeal to the council, to refuse registration until such evidence is furnished, duly attested by oath or affidavit before a judge of the county court of any county (*ib.*, s. 32 [2]).

Erasure and Restoration of Name.—A practitioner is liable to have his name erased from the register where he has been convicted before [1] or after registration of an offence which, if committed in Canada, would be a felony [2] or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct [3] in a professional respect (*ib.*, s. 33 [1]).[4]

The council may, and on the application of any four registered medical practitioners must,[5] cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section, and on proof of such conviction or conduct shall cause his name to be erased from the register.[6] The name

[1] The words of the statute (as it existed in 1879) respecting conviction of felony referred to a conviction after registration. Regina *v.* Coll. of Phys. & Surg., 44 Up. Can. Q. B., 146 (1879). *Cf.* People *v.* Hawker (N. Y.), n. 2, p. 386

[2] The words "A person known to have been convicted of a felony" (in the statute as it existed in 1879) did not include a person who in addition had undergone his sentence or had been pardoned. Regina *v.* Coll. of Phys. & Surg., 44 Up. Can. Q. B., 146 (1879). *Cf.* People *v.* Hawker (N. Y.), n. 1, p. 390.

[3] Mere advertising in newspapers or by hand-bills is not in itself disgraceful conduct in a professional respect. *Re* Washington, 23 Ont. R., 299 (1893).

But advertisements which are studied efforts to impose upon the credulity of the public for gain, constitute disgraceful conduct in a professional respect (*ib.*).

The charge should be sufficiently specific to point out the disgraceful conduct (*ib.*). But the accused is not prejudiced by a charge insufficiently specific, if he is informed of the evidence on application, allowed to cross-examine the witnesses and to call witnesses (including himself) in contradiction (*ib.*).

[4] It is disgraceful conduct in a professional respect to take money from patients to treat them for catarrh or catarrhal bronchitis until cured, when their malady is consumption in its last stages. *Re* Washington, 23 Ont. R., 299 (1893).

It is not disgraceful conduct in a professional respect to publish broadcast the symptoms of a disease (*ib.*). The report of a committee of the council is not to be set aside or treated as a nullity because they took unnecessary evidence or drew conclusions from the facts. It is the duty of the council to read the report and the evidence. It will be assumed that they have done it (*ib.*).

[5] It is imperative upon the council when application has been made to them by four registered medical practitioners, but otherwise it is discretionary with them, to cause inquiry to be made into the case of a person alleged to be liable to have his name erased from the register. *Re* Washington, 23 Ont. R., 299 (1893).

[6] *It seems* that there is no law requiring the council to keep a record, or making non-entry of a proceeding

of a person shall not be erased on account of his adopting or refraining from adopting the practice of any particular theory of medicine or surgery; nor on account of a conviction for a political offence out of Her Majesty's dominions, nor of conviction for an offence which ought not, either from its trivial nature or its circumstances, to disqualify a person from practising medicine or surgery (*ib.*, s. 33 [2]).

The council may order to be paid out of any funds at their disposal such costs as they may deem just to any person against whom any complaint has been made, which, when finally determined, is found to have been frivolous and vexatious (*ib.*, s. 33 [3]).

When the council directs the erasure of any name or entry, it shall not be again entered except by direction of the council or any divisional court of the high court of justice (*ib.*, s. 34 [1]).

If the council think fit, they may direct the registrar to restore any name or entry erased, without fee, or on payment of such fee not exceeding the registration fee as the council may from time to time fix (*ib.*, s. 34 [2]).

The council is required to ascertain facts, in the exercise of its powers of erasing and restoring, by a committee of their own body of not more than five, and a written report of the committee may be acted on by the council (*ib.*, s. 35 [1], [2]).

At least two weeks' notice [1] of the first meeting of the committee for taking the evidence or otherwise ascertaining the facts of any case must be served on a person whose conduct is subject to

evidence against the council. Regina *v.* Sparham, 8 Ont. R., 570 (1885).

The action of the council in erasing a name for conviction of a felony is a judicial and not a ministerial one (*ob. dic.*). Regina *v.* Coll. of Phys. & Surg., 44 Up. Can. Q. B., 146 (1879).

[1] A person whose name is to be erased from the register for conviction of felony is entitled to notice and hearing, and the council may refuse to erase though they find that a felony has been committed (*ob. dic.*). Rose, J., in Regina *v.* Sparham, 8 Ont. R., 570 (1885).

It seems that the mere fact that there is no record of a proceeding for erasure of which one whose name is erased had previous notice and an opportunity to be heard, is not evidence that there was no such notice or opportunity, and such failure of evidence does not invalidate an erasure, appearing on the register, to have been made by order of the council. Regina *v.* Sparham, 8 Ont. R., 570.

A person whose name is to be erased from the register on the ground of conviction of a felony is entitled to notice and a hearing. Regina *v.* Coll. of Phys. & Surg., 44 Up. Can. Q. B., 146 (1879).

On practice in cases of erasure, and the duty of a committee to give notice to the person charged, with a copy of the charge and a specification of particulars, see *Re* Washington, 23 Ont. R., 299 (1893).

inquiry, and such notice must embody a copy of the charges or a statement of the subject-matter of the inquiry, and specify the time and place of meeting. The testimony is under oath, and subject to cross-examination and the full right to call evidence in defence and reply. In the event of the non-attendance of such person the committee, on the proof of personal service of the notice, may proceed with the inquiry in his absence and without further notice (*ib.*, s. 35 [5]). The procedure of the committee on erasing and restoring names is provided for by sections 35, 36.

No action can be brought against the council or committee for anything done *bona fide* under this act notwithstanding want of form in the proceedings. Any person whose name has been ordered erased may appeal from the decision of the council to a divisional court of the high court at any time within six months from the date of the order of erasure, and the court may make such order as to restoration, confirmation, or further inquiries by the committee or council and as to costs as to the court shall seem right (*ib.*, s. 36).

The appeal may be by a motion and notice thereof served on the registrar, and is founded upon a copy of the proceedings before the committee, the evidence taken, the committee's report, and the order of the council certified by the registrar. The registrar is required to furnish to any person desiring to appeal a certified copy of all proceedings, reports, orders, and papers on which the committee acted, on payment of five cents a folio (*ib.*, s. 37).

Sections 38 and 39 provide for procuring the attendance of witnesses before the committee on an inquiry under sec. 33, and for a direction by the council, of the payment of costs by the person whose name has been directed to be erased.

Rights of Registered Persons.—Every person registered is entitled according to his qualifications to practise medicine, surgery, or midwifery, or any of them, as the case may be, and to demand and recover in any court reasonable charges for professional aid, advice, and visits and the cost of any medicine or other medical or surgical appliances rendered or supplied by him to his patient (*ib.*, s. 40).[1]

[1] See Hawker *v.* State, p. 390, n. 1. In an action for libel, the declaration alleged that the plaintiff was a physician and surgeon, licensed to practise according to the laws of the province; proof that he acted as such

All members of the medical profession, whether physicians or surgeons, are exempt from being elected or appointed members of the council of any municipal corporation or to any other municipal office (Act 1903, c. 19, s. 84).

LIMITATIONS.—One year after the termination of professional services requested or rendered is established as a period of limitations for an action for negligence or malpractice by reason thereof against duly registered members of said college (Rev. St., 1897, c. 176, s. 41).

EVIDENCE.—A correct register of names, residences, medical titles, diplomas, and qualifications with the dates thereof, of persons appearing on the register as existing on the day of publication, called The Ontario Medical Register, is required to be printed and published from time to time by the registrar under the direction of the Council, and a copy thereof purporting to be so printed and published is *prima facie* evidence that the persons specified are registered; and, subject to the provisions of sub-section 2 of this section, the absence of the name of any person from such copy shall be *prima facie* evidence that such person is not registered (*ib.*, s. 42 [1]).

In case of the name of a person not appearing in such copy, a certified copy, under the hand of the registrar, of the entry of the name on the register is evidence that such person is registered (*ib.*, s. 42 [2]).

ANNUAL CERTIFICATE OF REGISTRATION.—Every registered medical practitioner is required to obtain from the registrar annually, before December 31st, a certificate under seal of the college that he is a duly registered medical practitioner (*ib.*, s. 44 [1]).

On payment of all fees and dues payable by such medical practitioner to the college, the registrar is required to write his name and the date on the margin of the certificate, and the certificate is deemed to be issued only from such date; any fees properly charged during the time in which a name was erased from the register are legally recoverable on production of the certificate of registration at time of suit (*ib.*, s. 44 [2]). [Act 1902, c. 12, s. 21, provided that at the next election of members of the council, registered practitioners might vote notwithstanding non-payment of their annual fees.]

was insufficient without showing a license (but he was held entitled to recover because he was libelled in his private character). Burwell *v.* Hamilton, Hil. Term., 2 Wm. IV, cited in Robinson & Harrison Upper Can. Dig., p. 269.

No certificate is issued to any practitioner indebted to the college, nor until the annual fee for the certificate prescribed by the statute and the by-laws of the college is paid (*ib.*, s. 44 [3]).

If a practitioner omits to take out such annual certificate, he shall not be entitled thereto until he pays the certificate fee, and any other fees or dues which he owes the college (*ib.*, s. 44 [4]).

After twelve months' default in taking out such certificate, and two months' notice of default by registered letter to the registered address of the defaulter, if payment is not made, the registrar is required to erase his name, and the provisions as to unregistered practitioners forthwith apply (*ib.*, s. 44 [5]).

Such medical practitioner may, unless otherwise disqualified, obtain re-registration and reinstatement to full privileges by applying to the registrar and paying up the fees and dues and taking out his certificate (*ib.*, s. 44 [6]).

The provisions of sections 43 and 44 continue in force only so long as by-law of the council passed June 28th, 1895, adopting the same remains in force; the council may repeal said by-law and may by by-law from time to time re-enact the said provisions in whole or in part or with such modifications as the council deems proper, subject always to the limit prescribed by sec. 43 (*ib.*, s. 45 [1]; see *infra*, FEES).

No member of the council is entitled to vote on any by-law under this section except the elected members of the council, nine of whom at least must be present at the passing of the by-law (*ib.*, s. 45 [2]).

NEGLECT TO REGISTER.—Those entitled to register and neglecting or omitting so to do are not entitled to any rights or privileges conferred by registration so long as such neglect or omission continues, and are liable to all the penalties against unqualified or unregistered practitioners (*ib.*, s. 46).[1]

OFFENCE OF REGISTRAR.—If the registrar makes or causes any wilful falsification in any matter relating to the register he is liable to a penalty of $50 and is disqualified from again holding the office of registrar (*ib.*, s. 47).

FRAUDULENT REGISTRATION.—If a person procures or causes to be procured registration by means of any false or fraudulent representation or declaration verbal or written, it is lawful for the registrar, on receipt of sufficient evidence of such falsity

[1] See n. 1, p. 642.

or fraud, to represent the matter to the council, and on the written order of the president, attested by the seal of the college, to erase his name from the register and publish the fact and cause the erasure in the Ontario *Gazette;* and after such notice such person ceases to be a member of said college and to enjoy the privileges conferred by registration and shall not be entitled to enjoy the same at any future time without the express sanction of the council (*ib.*, s. 48 [1]).

Offences and Penalties.[1]—Wilfully procuring or attempting to procure registration by any false or fraudulent representation or declaration is punishable with a penalty not exceeding $100. Knowingly aiding and assisting therein is punishable with a penalty of from $20 to $50 for each offence (*ib.*, s. 48 [2]).

Practising[2] or professing to practise medicine, surgery, or

[1] Where one escapes conviction merely on an error of procedure, costs will not be awarded to him. Regina *v.* Hall, 8 Ont. R., 407 (Q. B. D.); Regina *v.* Sparham, 8 Ont. R., 570 (Q. B. D.).

(Former) Sec. 46 provides a mode of enforcing the payment of the penalty, therefore sec. 57, c. 31, 32-33 Vict., does not apply; and where, upon conviction, the court ordered distress in default of payment, the conviction was quashed on that ground. Regina *v.* Sparham, 8 Ont. R., 570 (1885).

(Former) Sec. 40 applies as well to a person whose name has been erased as to one who was never registered. Regina *v.* Sparham, 8 Ont. R., 570 (1885).

On the quashing of a conviction no costs will be given. Regina *v.* Coulson, 24 Ont. R., 246.

On a motion to quash a conviction, in Regina *v.* Stewart, 17 Ont. R., 4 (1889), which was quashed, it was provided that no action should be brought against the magistrate nor the prosecutor except as to payment of costs by the latter.

The act makes (in 1887) no provision for the costs or charges of commitment or conveying to jail. A magistrate cannot direct payment of any costs, charges, or expenses which he is not by law entitled to award against the person charged. On quashing the conviction, where the merits are against the defendant, it will be quashed without costs, and the usual order of protection granted. Regina *v.* Wright, 14 Ont. R., 668.

[2] Practising.—No particular number of cases is required as evidence of practising. Where one prescribes and orders aperient medicine, as well as applies oil externally, for a malady, this is practising medicine. Regina *v.* Hall, 8 Ont. R., 407 (Q. B. D., 1885).

To practise a calling does not mean to exercise it on an isolated occasion, but frequently, customarily, or habitually; each individual act affords cumulative evidence of practising, but proof of one act does not amount to practising. Queen *v.* Whelan, 4 Can. Cr. C., 277, citing Apothecaries *v.* Jones (1893), 1 Q. B., 93.

A person who has treated a number of patients on one day cannot be convicted of more than one offence; prescribing different treatment to each patient does not constitute separate offences on the same day. Queen *v.* Whelan, 4 Can. Cr. C., 277, citing Apothecaries *v.* Jones (1893), 1 Q. B., 93.

Only the offence created by the statute can be made the subject of conviction; the overt acts are evidence (*ib.*).

See Apothecaries *v.* Jones (1893), 1 Q. B., 93, cited in Queen *v.* Whelan, 4 Can. Cr. C., 277, for discussion as to when several acts on different days constitute but one offence.

In Queen *v.* Whelan, 4 Can. Cr. Cas., 277, it is indicated that evidence of several acts at periods remote from each other do not constitute sufficient evidence of practising (as a midwife) in violation of the law.

The single act of prescribing medicine to one person on one day will not amount to a practising of medicine. King *v.* Lee, 4 Can. Cr. C., 416.

Evidence of acts of practising antecedent to the date named in the conviction might be given to establish a practising (and possibly also of subsequent acts prior to laying the information), but the acts must be sufficiently approximate in point of time to afford evidence of practising, rather than tending to establish the commission of a separate offence. King *v.* Lee, 4 Can. Cr. C., 416 (1901).

Practising Medicine.—To practise medicine must be to prescribe or administer any substance which has, or is supposed to have, the property of curing or mitigating disease. Regina *v.* Stewart, 17 Ont. R., 4 (1889). See also Queen *v.* Howarth, 1 Can. Cr. C., 14.

In order to render himself liable for practising medicine, a person must have for gain prescribed or recommended for trial a particular remedy selected by himself as appropriate to the symptoms described by the patient. If the patient selects the remedy himself, making up his own mind, there is no offence. A druggist is allowed to state fully the qualities and properties of two or more remedies, and even to say which in his opinion is the better remedy or compound; but he must stop short of recommending which remedy the patient should take. Manual manipulation after inquiry as to symptoms is not practising medicine. Queen *v.* Valleau, 3 Can. Cr. C., 438.

One who professes to cure only by rubbing with hands or by suggestion that his patients are cured is not practising medicine, though he questions his patient as to his symptoms. Diagnosing only, or professing to diagnose, without prescribing a remedy or medicine, is not practising medicine. Queen *v.* Valleau, 3 Can. Cr. C., 435.

It is not practising medicine to sit still and fix the eyes on a sick person for pay. Regina *v.* Stewart, 17 Ont. R., 4 (1889).

Where a person contracts to administer medicine over a period of some months, and the contract implies or requires an exercise of judgment to determine the length of time, the nature of the medicine, and the quantity—this depends upon a knowledge of symptoms, a determination of the disease, its stage of advancement, and the probable effect of the medicine; this is diagnosing and treating disease, practising medicine, not merely selling proprietary remedies. Regina *v.* Coulson, 27 Ont. R., 59 (C. P. D., 1896).

Apothecary.—*Apothecary* is not given the meaning in Ontario which it has in England. In England it is applied to those who practise medicine and at the same time deal in drugs. This is because of the privilege there accorded to apothecaries by special acts. Be that as it may, a certificate under the Pharmacy Act of Ontario is a certificate of competency merely to conduct the business of chemist and druggist. No one can practise as a physician without a certificate under the Medical Act; and the latter certificate does not entitle one to carry on the business of chemist and druggist. Regina *v.* Howarth, 24 Ont. R., 561.

Druggist.—A druggist or chemist may, without "practising medicine," state what remedies he has for maladies named by his customer, or may state which is considered best for such malady, or may tell customers their qualities or properties and commend his goods as fit for the purpose for which he sells. A line is to be drawn between advising a remedy for a disease which the druggist fancies he discovers from his patient's symptoms, and advising between different remedies for a complaint which the customer states that he has. Regina *v.* Howarth, 24 Ont. R., 561.

Where a person went into a druggist's shop and stated that he was sick, and described his complaint, and the druggist advised him as to diet and stated his opinion that he was suffering from diarrhœa, and stated that he had several mixtures and had sometimes to inquire as to symptoms

midwifery [1] without registration, for hire, gain, or hope of reward,[2] or advertising to give advice in medicine, surgery, or midwifery without registration,[3] is punishable with a penalty of from $25 to $100 (*ib.*, s. 49).

A person wilfully or falsely pretending to be a physician,[4] doctor of medicine, surgeon or general practitioner, or assuming any title, addition, or description other than he actually possesses and is legally entitled to, is punishable with a penalty of from $10 to $50 (*ib.*, s. 50).[5]

A person not registered, taking or using any name, title, addition, or description implying or calculated to lead people to infer that he is registered under this act or is recognized by law as a physician, surgeon, accoucheur, or licentiate in medicine, surgery, or midwifery is punishable by a penalty of from $25 to $100 (*ib.*, s. 51).[5]

in order to decide what mixture to give, and then sold his customer a bottle of diarrhœa mixture, he was practising medicine. His registration under the Pharmacy Act did not entitle him to do this. Regina *v.* Howarth, 24 Ont. R., 561 (C. P. D., 1894).

In the last-mentioned case the court would not divide the matter and distinguish between the charge for advice and the charge for medicine, though the charge was no greater than if the advice had not been given. In such circumstances his act was the practice of medicine for gain. Regina *v.* Howarth, 24 Ont. R., 561 (C. P. D., 1894).

Partnership.—There is nothing illegal in a contract of partnership between a licensed medical practitioner and an apothecary and chemist from which it cannot be inferred that it was in contemplation of either of the parties that the latter should practise physic. Swan *v.* Scott, 23 Up. Can. Q. B., 434 (1864).

[1] A conviction for practising midwifery contrary to the statute is bad unless it sets out the particular act or acts. Queen *v.* Whelan, 4 Can. Cr. C., 277 (1900). So also of practising medicine, King *v.* Lee, 4 Can. Cr. C., 416 (1901), citing Regina *v.* Spain, 18 Ont. R., 315.

[2] A salaried clerk of a druggist, who (the clerk) makes no profit from a sale, cannot be said to have practised medicine for hire, gain, or hope of reward, in making such sale. Foster *v.* Rose, 37 Can. L. J., 824 (1901).

[3] A person accused of practising without registration, whose name appears to have been erased from the register is not precluded from showing that it was improperly removed or erased, and therefore as matter of law is to be taken to be on the register. Regina *v.* Sparham, 8 Ont. R., 570 (1885).

[4] If a person is a doctor of medicine he is not punishable under sec. 41, as it existed in 1880, though not registered; but if he falsely professes to be registered he is punishable under sec. 42. Regina *v.* Tefft, 45 Up. Can. Q. B., 144 (1880).

[5] The assumption of the title "doctor" in a sign on a door, without supplemental words, from which it might be gathered that a particular meaning is intended, does not sustain a conviction for unlawfully taking and using a name, title, and description implying and calculated to lead people to infer that the owner and user of the sign was registered under the Medical Act, and that he was recognized by law as a physician, surgeon, and a licentiate in medicine or surgery. Foster *v.* Rose, 37 Can. L. J., 824 (1901).

A person, not registered, who was in partnership with two registered

Unregistered Persons.—No person is entitled to recover any charge in any court for any medical or surgical advice or for attendance or for the performance of any operation or any medicine which he may have prescribed or supplied unless he produces to the court a certificate that he is registered under this act; but this section does not extend to the sale of any drug or medicine by a duly authorized chemist or druggist (*ib.*, s. 52).[1]

No person shall be appointed as medical officer, physician, or surgeon in any branch of the public service, or in any hospital or other charitable institution not supported wholly by voluntary contributions, unless he be registered (*ib.*, s. 53).

No certificate required from any physician, surgeon, or medical practitioner is valid unless the signer be registered under this act (*ib.*, s. 54).

Prosecutions.—Any prosecutions under the act may be brought or heard before any one or more of Her Majesty's justices of the peace having jurisdiction where any such offence has been committed (*ib.*, s. 55).[2]

Costs.[3]—The justice or justices may award payment of costs

physicians (the two having a fanlight sign containing the names of the registered practitioners and the additions "M.D., M. C. P. & S., Ont.," with the name of the unregistered physician, and the addition M.D.), was not using the title M.D. in a way calculated to lead people to infer his registration. Regina *v.* Tefft, 45 Up. Can. Q. B., 144 (1880).

Sec. 42 (as it existed in 1880) applies exclusively to cases of false representation of registration; sec. 43 (as it existed in 1880) has no application to members of the society, but applies to parties practising as medical men or surgeons. Regina *v.* Tefft, 45 Up. Can. Q. B., 144 (1880).

[1] See n. 2, p. 645.

[2] On review of a conviction before a magistrate, the court will look at the evidence taken before the magistrate; if there is none showing an offence, it will quash the conviction; but if there is any, the court will not interfere. Regina *v.* Coulson, 27 Ont. R., 59 (C. P. D., 1896).

On certiorari to review conviction before a magistrate, if the conviction is valid on its face the court is not to look at the evidence for the purpose of determining whether an offence is established by it. Regina *v.* Coulson, 24 Ont. R., 246 (Q. B. D., 1894); but see same title, 27 Ont. R., 59.

A conviction is bad where it does not specify the particular act or acts which constituted the alleged practising of medicine. (But if the magistrate had jurisdiction, the court will look at the evidence, to see whether an offence was committed, and, if so, will amend the conviction.) Regina *v.* Coulson, 24 Ont. R., 246 (1894), (Q. B. D.); Queen *v.* Coulson, 1 Can. Cr. C., 114, 118.

The court, on appeal from a conviction by a magistrate under this act, cannot ignore the adjudication and formal conviction, and upon the evidence make a new adjudication and frame a new conviction free from the defects complained of. King *v.* Lee, 4 Can. Cr. C., 416 (1901).

In King *v.* Lee, 4 Can. Cr. C., 416 (1901), the court declined to consider whether a conviction was bad for disclosing two offences, practising and professing to practise, having quashed it on other grounds.

[3] See n. 1, p. 645.

in addition to the penalty, and in default of payment may commit to the common jail for a period not exceeding one month unless the penalty and costs are sooner paid (*ib.*, s. 55).[1]

APPEAL.[2]—Any person convicted who gives notice of appeal must give satisfactory security before being released from custody for the amount of the penalty and the costs of conviction and appeal (*ib.*, s. 56).

PROOF.—In any trial under the act, the burden of proof as to registration is on the person charged (*ib.*, s. 57).

Where proof of registration is required, the production of a printed or other copy of the register certified under the hand of the registrar of the council for the time being is sufficient evidence of all persons who are registered practitioners, and any certificate upon such copy purporting to be signed by any person in his capacity of registrar is *prima facie* evidence that such person is registrar without proof of his signature or of his being registrar (*ib.*, s. 58).

LIMITATIONS OF PROSECUTIONS. — Prosecutions are limited to commence within one year from the date of the offence (*ib.*, s. 59).

STAY.—The council may, by order signed by its president having the seal of the college appended, stay proceedings in any prosecution when deemed expedient (*ib.*, s. 60).

PROSECUTOR.—Any person may be prosecutor or complainant and the council may allot such portion of the penalties recovered as may be expedient toward the payment of such prosecutor (*ib.*, s. 61 [2]).

QUALIFICATION.—Schedule B referred to in the act (ss. 24 and 35) is as follows:

1. License to practise physic, surgery, and midwifery, or either, within Upper Canada under the acts of Upper Canada, 59 G. III., c. 13, and 8 G. IV., c. 3, respectively.

2. License or diploma granted under 2 Vict., c. 38, or under the Consolidated Statutes for Upper Canada, c. 40, or any act amending the same.

3. License or authorization to practise physic, surgery, or midwifery, or either, within Lower Canada, whether granted

[1] Where an adjudication directs an imprisonment for one month, and the conviction directs an imprisonment for thirty days (from February 5), this overruns one month by two days, and the variation is fatal to the conviction. King *v.* Lee, 4 Can. Cr. C., 416.

[2] See n. 2, p. 648.

under ordinance 28 G. III., c. 8, or act 10 and 11 Vict., c. 26 and acts amending the same, or under c. 71 of the Consolidated Statutes for Lower Canada, or any act amending the same.

4. Certificate of qualification to practise medicine, surgery, and midwifery, or either, granted by any colleges or bodies named or referred to in sec. 6 of the act.

5. Medical or surgical degree or diploma of any university or college in Her Majesty's dominions or of such other universities or colleges as the council may determine.

6. Certificate of registration under the Imperial Act 21 and 22 Vict., c. 90, known as "The Medical Act," or any act amending the same.

7. Commission or warrant as physician or surgeon in Her Majesty's military service.

8. Certificates of qualification to practise medicine under any of the acts relating to homœopathy or the eclectic system of medicine.

Fees.—For registration under acts mentioned in sec. 3 no fee (*ib.*, s. 24).

To registrar, for transfer under sec. 9 (2), $2 (*ib.*, s. 9 [2]).

To registrar, for registration under sec. 24, not more than $10, to be fixed by the by-laws of the council (*ib.*, s. 24).

To registrar, for registration under sec. 25, such fees as the council may by general by-law establish (*ib.*, s. 25).

To registrar, for copies under sec. 37, 5 cents a folio (*ib.*, s. 37).

Every member of the college is required to pay an annual fee to the registrar or his deputy, not less than $1 nor more than $2, as determined from time to time by by-laws of the council, due on and from January 1st, and deemed to be a debt due by each member of the college, recoverable with costs of suit in the name of the college, in the Division Court where the member resides (*ib.*, s. 43 [1]), the means of enforcing which may be prescribed by by-law of the council (see *supra*, s. 45) (*ib.*, s. 43 [2]). [See *supra*, p. 643, Act 1902, c. 12, s. 21.]

Taxation.—Every person practising or carrying on business as a physician, surgeon, oculist, aurist, or medical electrician, and occupying or using land in a municipality (*i.e.*, a city, town, incorporated village, or township; Act 1904, c. 23, s. 2, s.s. 5) for the purpose of his business, is assessed for a sum, called the

Business Assessment, to be computed by reference to the assessed value of the land so occupied or used by him, and at a sum equal to 50 per cent of said assessed value (*ib.*, s. 10, s.s. 1, *f*); the minimum assessment of persons assessable hereunder is $250 (*ib.*, s. 10, s.s. 3); if he uses the land partly for residence and partly for business purposes, 50 per cent of the assessed value of the land occupied or used for the business purpose is taken as the full assessed value of the land so occupied or used (*ib.*, s. 10, s.s. 1, *f*); if his income exceeds the amount of such business assessment, he is assessed on the excess of income (*ib.*, s. 11, s.s. *c*). If he is not liable to assessment for a business assessment, he is assessable on his income, and he is assessable on his income not derived from his said business (*ib.*, s. 11, ss. *a* and *b*).

Prince Edward Island.

Medical Act.—The act of May 19th, 1899, c. 24 of 1899, is cited as "Prince Edward Island Medical Act" (Act 1899, c. 24, s. 1, *a*).

Medical Society.—The members of the medical profession constitute a body corporate under the name of the "Medical Society of Prince Edward Island" (Act 1899, c. 24, s. 2).

Every person registered under the Medical Act of 1892 and the act to amend the same is a member of the society and entitled to register under this act without a fee (*ib.*, s. 3).

Every person registered under this act is a member of the said society (*ib.*, s. 3).

Definitions.—In this act unless the context otherwise requires, the word "medicine" includes surgery and midwifery (Act 1899, c. 24, s. 1 [*b*]). In this act or any other act of the legislature or legal public document the words "qualified medical practitioner," or any other words imputing a person "recognized by law as a medical practitioner or member of the medical profession shall be construed to mean a person registered under this act (*ib.*, s. 1 [*c*]).

Registration.—There is a council of said society, composed of seven members elected from among and by the registered members of the society (*ib.*, s. 4); all members of the council shall be practitioners duly registered under this act and residents of this province; a member of the council ceasing to reside in

the province thereby vacates his office (*ib.*, s. 4 [1]). The council is required to appoint a registrar among other officers (*ib.*, s. 6); and to cause him to keep a register of the name of every person registered under this act, and from time to time of the names of all persons who have complied with this act and the rules and regulations made by the council respecting the qualifications to be required from practitioners of medicine in the province, which is called the Prince Edward Island Medical Register; and only those persons whose names are inscribed therein are qualified and licensed to practise medicine except as hereinafter provided; and such register shall at all times be open and subject to inspection by any person (*ib.*, s. 7).

The registrar is required to keep his register correct, and in accordance with the provisions of this act, and the rules, orders, and regulations of the council, and to make from time to time the necessary alterations in the addresses or qualifications of persons registered (*ib.*, s. 8).

The council is required to admit to registration, on the payment of the registration fee, all persons duly registered by the General Medical Council of Great Britain (*ib.*, s. 9).

Any person being at the time a resident in this province, and who at any time between July 1st, 1896, and July 1st, 1899, commenced the study of medicine for the purpose of qualifying himself to practise the same in this province, and who complies with the conditions and provisions in that behalf contained in the acts by this act repealed (The Medical Act, 1892, and the act to amend the same), and with the rules and regulations made thereunder and now (May 19th, 1899) in force, and who after July 1st, 1899, pursues and completes the remainder of his studies under the conditions and provisions of this act, is entitled to be registered under this act (*ib.*, s. 42 [2]).

Every medical practitioner whose name appeared on the register of the council on June 30th, 1899, as a duly registered medical practitioner is considered and deemed to be duly registered under this act, but subject, nevertheless, to its provisions (*ib.*, s. 42 [6]).

Subject to the exceptions made in this act, no person is entitled to have his name entered on the Medical Register unless he produces evidence satisfactory to the council: (*a*) that he has passed a preliminary or matriculation examination on the sub-

jects specified in the by-laws of the council and had his name registered in the Medical Students' Register; (*b*) that after such examination and registration he has pursued his professional studies during a period of not less than four years; (*c*) that during said four years he attended at a university college or incorporated school of medicine, in good standing, a graded collegiate course of four sessions, each session to be of such duration, and the entire course to include sufficient and satisfactory lectures and instruction in medicine, surgery, and midwifery, together with such attendance upon the general practice of a hospital, as the by-laws of the council shall require; (*d*) that he has satisfactorily passed an examination in the various branches of professional studies, specified in the by-laws of the council, before professional examiners appointed by the council; and upon passing the examination required, and on payment of the fee for such examination, also the fee for registration, which fees shall be fixed by the by-laws of the society, he shall be entitled to registration.

Provided that any person holding the degree of B.A. from any university in Her Majesty's dominions, or any person holding a teacher's license of the first class of this province shall not be required to pass the matriculation examination (*ib.*, s. 10).

Medical Students' Register.—The council is required to cause to be kept by the registrar a book or register to be called the "Medical Students' Register" in which shall be entered the names of all who have passed the said matriculation examination, together with the date of registration and such other particulars in regard thereto as may by the council be deemed necessary or expedient. A fee of $2 shall be paid for such registration and a certificate thereof (*ib.*, s. 11).

Examining Body of Other Province.—When there has been established an examining body similar to that constituted by this act or an institution recognized by the legislature of any other province of the Dominion of Canada as the sole examining body for granting certificates of qualification, and wherein the curriculum is equal to that approved by the Medical Council of the Province of Prince Edward Island, the holder of any such certificate shall, upon due proof, be entitled to registration by the Council of Prince Edward Island, if the same privilege is accorded such in other province to those registered in Prince

Edward Island (*ib.*, s. 12) (see *infra*, s. 40, "Central Examining Board").

Canada Medical Act.—It is expedient and desirable that the privileges contained in the Canada Medical Act, 1902, should be placed within the reach of the medical practitioners of this province (Act 1903, c. 16).

Whenever there is established under the act of the Parliament of Canada known as the "Canada Medical Act, 1902," or any act in amendment thereof, a register for Canada of medical practitioners under the control of the Medical Council appointed or elected pursuant to the provisions of the aforesaid act or acts, then, notwithstanding anything in the Prince Edward Island Medical Act, any person duly registered in the said Medical Register for Canada as a medical and surgical practitioner shall be deemed qualified and entitled to be registered in the Medical Register of this province as a duly qualified medical and surgical practitioner, and shall be so registered upon the production of a certificate under the hand of the registrar of the said Medical Council for Canada, certifying that such person is duly registered in said register for Canada, and upon satisfactory proof of the identity of such person, provided that such person may be required to pay such fee upon such provincial registration as the Medical Council of this province may prescribe in that behalf, not exceeding the fee ordinarily charged for registration under the by-laws of the council of this province; provided also that nothing herein contained shall affect or take away any of the privileges or rights conferred upon the medical profession of this province by the act (Act 1899, c. 24) respecting the profession of medicine and surgery (Act 1903, c. 16).

Registration of Additional Qualification. — Every person registered under this act who obtains any higher degree or other qualification shall, on the payment of such fees as the council shall appoint, be entitled to have it registered in substitution for or in addition to the qualification previously registered (Act 1899, c. 24, s. 14).

Evidence for Registration.—No qualification is entered on the first registration or by way of addition unless the registrar be satisfied, by proper evidence, that the person claiming is entitled to register it. There is an appeal to the council; any name proved to the council to have been fraudulently or incorrectly

entered may be erased by an order in writing of the council (*ib.*, s. 15).

If the registrar is dissatisfied with the evidence, he may, subject to appeal to the council, refuse registration until the person claiming it has furnished evidence to the satisfaction of the registrar, duly attested by oath or affidavit before a notary public or justice of the peace (*ib.*, s. 16).

Erasure from Register—Persons Practising without Registration.—A medical practitioner guilty of infamous or disgraceful conduct in a professional respect is liable to have his name erased from the register, and if he apply for registration the council may refuse it (*ib.*, s. 17).

The council shall on application in writing of any three registered practitioners specifying the cause or causes of complaint cause inquiry to be made into the case of a person alleged to be liable to have his name erased from the register on account of infamous or unprofessional conduct. No action shall be brought against the council for anything done bona fide under this section for want of form (*ib.*, s. 17).

The registrar may on order of the council publish in any newspaper or newspapers of Prince Edward Island the fact that the name of such person has been so erased, and the cause of the erasure, but not until the appeal, if any has been taken within the time allowed, has been disposed of (*ib.*, s. 18).

The registrar on order of the council may publish in any newspaper or newspapers in Prince Edward Island the name of any person unlawfully practising medicine in the province without registration (*ib.*, s. 18).

Where the council refuses to register a person, or directs an erasure, the name or entry shall not be again entered except by direction of the council or the order of the supreme court or a judge thereof (*ib.*, s. 19).

Five days' notice of the meeting of the council for the hearing of an application under sec. 17 must be served on the person whose conduct is the subject of inquiry, embodying a copy of the charges or a statement of subject of the inquiry and the time and place of meeting (*ib.*, s. 20). The procedure on such hearing is regulated in detail by the act (*ib.*, s. 20).

The council shall on receiving information that any member of the society has removed to another province or country and

engaged in the practice of his profession and there taken up his residence, cause his name to be erased from the register after two years' absence, unless he desires to continue membership by paying all dues and annual assessments of the council (*ib.*, s. 41).

Rights of Registered Persons.—Every person licensed or registered under the act is entitled according to his qualifications to practise medicine, surgery, and midwifery, or any of them, as the case may be, and demand and recover in any court with costs his reasonable charges for professional aid, advice, and visits, and the cost of medicine or other medical and surgical appliances rendered or supplied by him to his patients (*ib.*, s. 21).

Limitations.—Twelve months after the termination of such professional services is established as the period of limitations for a civil action against a person registered, for negligence or malpractice by reason of professional services requested or rendered (*ib.*, s. 22).

Evidence of Registration.—The registrar is required, under the direction of the council, to cause to be printed and published once in two years a correct copy of the register of the names of all persons registered, with their residences and medical titles, diplomas, and qualifications conferred by any college or body, with the dates thereof, as existing on the day of the publication. A copy of such register, for the time being, purporting to be so printed and published, is *prima facie* evidence that the persons specified are registered. According to the provisions of this act, and subject to subsection 2 of this section, the absence of a name from such copy is *prima facie* evidence that such person is not so registered (*ib.*, s. 23 [1]).

In case a name does not appear in such copy, a certified copy, under the hand of the registrar, of the entry of such name on the register is evidence that such person is so registered (*ib.*, s. 23 [2]).

Fraudulent Registration.—If a person be registered by any false or fraudulent representation or declaration, either verbal or written, the registrar may, on the receipt of sufficient evidence of the falsity or fraudulent character of such representation or declaration, represent the matter to the council, and on the written order of the president attested by the seal of the society erase his name from the register and make known the fact and cause by a notice in any newspaper or newspapers in Prince

Edward Island; after such notice the person whose name has been erased shall cease to be a member of the society and to enjoy any privileges conferred by registration under this act, and shall not be entitled to enjoy them at any future time without the express sanction of the council (*ib.*, s. 24 [1]).

Offences and Penalties.—Wilfully procuring or attempting to procure registration by false or fraudulent representation or declaration, verbal or in writing, is punishable with a penalty not exceeding $50. Knowingly aiding and assisting therein is punishable with a penalty of from $10 to $25 for each offence (*ib.*, s. 24 [2]).

Without registration or license, practising or professing to practise medicine, surgery, or midwifery for hire, gain, or hope of reward, or advertising in any manner or by any means whatsoever to give advice in medicine, surgery, or midwifery is punishable with a penalty not exceeding $25 (*ib.*, s. 25).

Wilfully or falsely pretending to be a physician, doctor of medicine, surgeon, or general practitioner, or assuming any title, addition, or description not actually possessed or to which such person is not entitled, or pretending to be recognized by law as a physician, accoucheur, or licentiate in medicine, surgery, or midwifery, is punishable with a penalty not exceeding $25 (*ib.*, s. 26).

Proceedings taken before a stipendiary magistrate or justice of the peace under the provisions of this act, shall be taken under the provisions of the Summary Convictions' Act of this province (*ib.*, s. 43).

Unregistered Persons.—No person is entitled to recover any charge for medical or surgical advice or attendance or for the performance of any surgical operation or for any medicine prescribed or supplied by him unless registered, licensed, or otherwise authorized under this act. This does not extend to the sale of any drug or medicine by any storekeeper, chemist, or druggist (*ib.*, s. 27).

No person is to be appointed as a medical officer, physician, or surgeon in any branch of the public service, or any hospital or other charitable institution unless registered under this act, and no certificate required by any act from any physician, surgeon, or medical practitioner, shall be valid unless the person granting or signing it is so registered (*ib.*, s. 28).

Costs.—On prosecution (before any stipendiary magistrate or two or more justices of the peace) costs may be awarded in addition to the penalty, and the offender may be committed to a common jail in default of paying the penalty and costs, for not exceeding one month unless sooner paid (*ib.*, s. 29).

Appeal from Conviction.—A person appealing from conviction is required before release from custody to give satisfactory security to the magistrate or justices, for the penalty, costs of conviction, and appeal (*ib.*, s. 30).

Limitation of Prosecutions.—Prosecutions are required to be commenced within six months from the date of the offence (*ib.*, s. 31).

Prosecutor.—Any person may be prosecutor or complainant, and the council may allot such portion of the penalties recovered as may be expedient toward the payment of the prosecutor (*ib.*, s. 32).

Appeal from Registrar's Decision.—A person aggrieved by the decision of the registrar may appeal to the council, and persons aggrieved by the decision of the council may appeal to the Supreme Court of the province, which appeal shall be final. The act prescribes the procedure on appeal (*ib.*, s. 33).

The council may rehear any case decided by them on production of new and reliable evidence by the party applying for a rehearing (*ib.*, s. 34).

By-Laws.—The majority present at the annual meetings or at any special meeting of the society called for the purpose, may make such regulations and by-laws as they consider not contrary to this act, for carrying out its purposes; such by-laws and all by-laws made by the council shall first be submitted to be approved by the lieutenant-governor in council, before having any force or effect, but nothing shall prevent any registered medical practitioner from giving medical treatment or advice to any person by reason of such person having previously engaged the services of any other physician (*ib.*, s. 35).

The council is authorized to make by-laws, rules, and regulations regarding the holding of examinations under sec. 10 and the subjects of such examinations, the fees for examinations and registration, the appointment of examiners, to fix the time and place of examinations and all such other matters as may be found necessary for carrying out the provisions of this act. All by-

laws of the council under this act must be approved by the society at a general meeting before coming into force, and all official acts of the council which concern the medical profession shall be subject to inquiry by the society which has power to alter or reverse the same (*ib.*, s. 36).

SAVING PROVISIONS.—The present law makes provision for continuing proceedings taken under the former act, when not inconsistent therewith, and for recovering penalties and forfeitures incurred under the former law, and provides that by-laws, orders, and regulations, not inconsistent with this act made under the act of 1892 and its amendment shall continue good and valid until annulled or others made in their stead (*ib.*, s. 42 [4]).

No offence committed and no penalty or forfeiture incurred, and no proceeding pending under the acts repealed (Medical Act 1892, and its amendment) or under any regulation made thereunder, is affected by the repeal (*ib.*, s. 42 [5]).

EXCEPTIONS.—The act does not prevent any person from giving necessary medical or surgical aid or attendance to any one in urgent need of it, provided it be not for hire or gain, nor the giving of it be made a business or means of livelihood; nor does it prevent women from practising midwifery, or any person from practising dentistry or treating cases of cancer by external application, and charging for such service and suing for and recovering reasonable charges in a court of law; nor does it prevent a druggist, apothecary, or storekeeper from suing for and recovering the price of drugs or chemicals supplied by him (*ib.*, s. 37).

The act does not prevent a person not holding a medical degree, license, or diploma from a university or college from practising medicine, provided he was engaged in such practice in the province for five years immediately before the passage of the act, nor from recovering with costs of suit his reasonable charges for professional aid, advice, and visits and the cost of medicine or other medical or surgical appliances rendered or supplied by him to his patients (*ib.*, s. 38).

APPEAL ON PROSECUTION.—Appeal from the decision on prosecution may be taken to the Supreme Court. The procedure is regulated by the act (*ib.*, s. 39).

CENTRAL EXAMINING BOARD.—The council has power to establish conjointly with the council or councils of any college or colleges of physicians and surgeons, incorporated under any act

of the legislature of any province in Canada or of the Northwest Territories, and possessing powers similar to those conferred upon the council by this act, a central examining board, and to delegate to such board all the powers possessed by the council respecting the examination of candidates for admission to practise medicine, surgery, and midwifery, provided that such powers shall not be exercised unless the persons passing any examination of such central board shall on complying with the laws and rules of the respective councils or boards in each such province, or the Northwest Territories, be entitled to registration as legally qualified practitioners in the provinces or territories, whose councils or boards may have conjointly with the council established such central examining boards; provided further that any examinations conducted by such central board shall be held at least in one place within this province, simultaneously with such examinations held in any of said other provinces or in the Northwest Territories (*ib.*, s. 40).

FEES.—Persons registered under sec. 3 are not required to pay a fee (*ib.*, s. 3).

For examination and for registration under sec. 10 (*d*) to be fixed by by-laws of the society (*ib.*, s. 10 [*d*]).

For registration of a higher degree under sec. 14, such fees as the council may appoint (*ib.* s. 14).

For registration under sec. 9, "the required fee" (*ib.*, s. 9).

For registration under Act 1903, c. 16 (see CANADA MEDICAL ACT, above), such fee as the medical council of this province may prescribe, not exceeding the fee ordinarily charged for registration under the by-laws of the council of this province (Act 1903, c. 16).

For registration in medical students' register and certificate thereof, $2 (Act 1899, c. 24, s. 11).

The council has power to levy an annual fee on the members of the society, not exceeding $5 yearly on each member; all such fees are payable to the registrar on July 1st each year, and such fee shall be deemed a debt due by each member of the society, recoverable with costs in the name of the society in any court of competent jurisdiction (*ib.*, s. 13).

QUEBEC.

COLLEGE OF PHYSICIANS AND SURGEONS.—All persons residing in the province authorized to practise medicine, surgery, or midwifery therein, and registered under this law, are constituted a corporation by the name of "The College of Physicians and Surgeons of the Province of Quebec" (R. S., 1888, art. 3,969).

The affairs of the college are conducted by a board of governors, forty-two in number, chosen as provided in the act and known as the "Provincial Medical Board" (*ib.*, art. 3,972 [as amd. Act 1898, 61 Vict., c. 30, s. 1] to art. 3,975).

QUALIFICATION.[1]—No person can lawfully practise medicine, surgery, or midwifery unless he has obtained a license from the said board and unless he be registered (*ib.*, art. 3,976).

Every person who obtains a medical degree or diploma in any university or college mentioned in art. 3,972 is entitled to such license without examination as to his medical knowledge or skill, provided such diploma has only been given after four years of medical study from the date of admission to study and according to the requirements of the act;[2] provided, the said board

[1] Act 1902, c. 123, 124; Act 1903, c. 141, 142, 143, 144, 145, 146, 147, 148, 149, for special reasons assigned in the acts, authorize the College of Physicians and Surgeons to admit among its members, and to license to practise, certain named individuals, who did not, or were not able without injustice to themselves, to comply with the strict requirements of this law. Acts 1903, c. 142 and 143, recite respectively as one inducement to the authority there conferred on the college, that there is no practising physician in the parish of St. Adelphe and in the parish of St. Paul de Chester respectively, where the petitioners respectively intend to practise medicine and surgery. See n. 1, p. 633. C. 145 of 1903 recites as one of the reasons for its passage that the applicant, though a graduate and doctor in medicine from Laval University after following its regular course, through ignorance of the law began to follow its course before obtaining a certificate of admission to the study of medicine. These special acts and cases are cited as illustrating how an intricate law may bar the entry into practice of persons who are by their attainments well qualified to practise. In c. 147 of 1903 the petitioner was a graduate in medicine of the University of Minnesota, after a four years' regular course in medicine, but was unable to obtain admission to practise under the general law. In c. 124 of 1902 the petitioner was the holder of the degree of doctor in medicine and master of surgery from McGill University, Montreal, was the holder of a certificate of graduation from the Illinois State Board of Health, the holder of a license to practise medicine and surgery in the State of New York, and a practitioner of medicine in the State of New York, yet he was debarred from admission under the general law in Quebec for failure to obtain from the College of Physicians and Surgeons of Quebec a certificate of admission to study.

has power to grant the same privileges to holders of degrees or diplomas of medicine and surgery from other British, colonial or French universities or colleges (*ib.*, art. 3,977).

The colleges referred to in art. 3,792 are: Laval University at Quebec, Laval University at Montreal, University of McGill College, University of Bishops College, The Incorporated School of Medicine and Surgery of Montreal affiliated with the University of Victoria College or with any other British university.[1] The privilege above conferred on holders of degrees or diplomas from British colleges and universities is extended to every person whose name is entered upon the medical register under the Imperial Medical Act of 1886 (49–50 Vict., c. 48) or of any act amending the same (*ib.*, art. 3,977 *a*, as added by Act 1889, c. 39).

The law prescribes the preliminary qualifications[1] for admission to study medicine, surgery, or midwifery to be ascertained by examination. No one is entitled to the license of the college on presentation of a diploma unless previously admitted to study in accordance with these conditions, or unless he has passed an equivalent preliminary examination before a college, school or board authorized by law to require and cause such preliminary examinations to be passed in Her British Majesty's other possessions (*ib.*, arts. 3,978, 3,979).

Notwithstanding art. 3,978 of the Revised Statutes, the College of Physicians and Surgeons shall grant the license and registration required for the *practice* of medicine, surgery, and obstetrics, to the persons who, being entered as medical students, and having commenced their medical course in a university of this province before November 1st, 1903, have (June 2d, 1904) obtained a diploma in medicine, after having attended the courses and studied the number of years required by the law and the regulations of the College of Physicians and Surgeons, and can es, tablish that they have matriculated in letters and in sciences, having obtained the same after classical courses in one of the colleges of this province, or who, having matriculated in only one of these branches, that they had since passed under the provisions of art. 3,979 of the Revised Statutes a satisfactory examination upon the subjects of the other (Act 1904, c. 27).

The College of Physicians and Surgeons is authorized to admit to practice the medical students who on November 1st, 1896, had

[1] See n. 1, p. 661.

commenced attending the medical course in a duly incorporated university of the province, before having obtained a certificate of admission to the study of medicine, and to grant them the necessary license to practise medicine, surgery, and obstetrics in the province after having passed the examinations required for admission to study and those required for admission to practise; and the college may, wheresoever they consider that the circumstances justify them so doing, exempt any such student from the examination required for admission to study, but such exemption shall affect only students or holders of diplomas of doctor of medicine resident in the province March 23d, 1900 (Act 1898, 61 Vict., c. 31, as amd. Act 1900, 63 Vict., c. 27).

No candidate for admission to the medical profession, who is the holder of a degree of Bachelor of Arts, Bachelor of Sciences, or Bachelor of Letters conferred on him by any Canadian or British university, shall be obliged to pass the examinations required by the act incorporating the members of said profession. On satisfactory proof that the candidate is the person named in such degree, he shall be entitled, on payment of the ordinary fees, to receive a certificate entitling him to study the medical profession (Act 1890, 53 Vict., c. 45, adding s. 3,503 *a* to Rev. Stats., 1888).

A candidate for a license to practise desiring to be registered, and who has not obtained a degree or diploma in medicine from any institution mentioned in art. 3,972 (*supra*) must, before being entitled to such license and to register, pass an examination before the board as to his knowledge and skill for the efficient practice of medicine, surgery, and midwifery. Upon passing the examination and proving to the satisfaction of the examiners that he has, in an institution for the teaching of medicine in Her Majesty's possessions, complied with the rules and regulations made by the provincial board, and on payment of such fees as the board may by general by-law establish, such person shall be entitled to a license (R. S. 1888, art. 3,980).

All persons coming from any recognized college outside of Her Majesty's possessions desirous of obtaining a license from the College of Physicians and Surgeons of the province must previously pass a preliminary examination before the examiners appointed by the board or establish to the satisfaction of the board that they have already passed equivalent examinations,

and they must moreover follow in one of the schools of medicine in the province a complete course (for six months) of lectures, and such other course or courses as shall be necessary to complete the curriculum required by the board. They may pass their professional examination immediately after their preliminary examination (*ib.*, art. 3,981).[1]

Powers of Medical Board.—The board of governors of the College of Physicians and Surgeons has among other powers the power to examine all credentials and documents purporting to entitle the bearer to a license to practise and all diplomas, degrees, or other qualifications sought to be registered, and to require the bearer to attest on oath, to be administered by the chairman, that he is the person whose name is mentioned therein, and that he became legally possessed thereof; and to register in the books of the college the name, age, place of residence and birth of every member of the profession practising in the province, the date of his license and the place where he obtained it (*ib.*, art. 3,982).

The provincial medical board, among other powers, has the power to make regulations respecting the tariffs or rates to be charged in towns and counties for medical, obstetrical, or surgical advice, or for attendance or for the performance of any operation or for any medicines prescribed or supplied. The tariff must be approved by the lieutenant-governor in council, and can only come into force six months after its publication once in the Quebec *Official Gazette*, and that of the order in council approving the same. The tariff does not, in case of suit, obviate the necessity of proof of giving the advice, care, prescriptions, medicines, and other things therein mentioned (*ib.*, art. 9,383).

The said board has power to fix the fees for license and registration (*ib.*, art. 3,984).

Qualifications of Candidate.[2]—The qualifications of a candidate for a license are:

1. That he holds a certificate of study from a licensed physi-

[1] See n. 1, p. 661.

[2] The College of Physicians and Surgeons cannot refuse to grant a license to practise medicine to a student who has passed the necessary examinations, or has been legally exempted from passing them, and who has obtained the degree of doctor of medicine; on such refusal a writ of mandamus may issue to enforce the issuing of a license. Gosselin *v.* Coll. of Phys. & Surg., Que. Rap. Jud. Off. Cour Supér., vol. xix., p. 175 (1901).

cian for the period intervening between the courses of lectures which he has followed.

2. That he has reached the age of twenty-one years.

3. That he has followed his studies during a period of not less than four years, commencing from the date of his admission by the board to study medicine.

4. That during said four years he attended at some university, college, or incorporated school of medicine within Her Majesty's possessions not less than two six-months' courses of general or descriptive anatomy, of practical anatomy, of surgery, of the practice of medicine, of midwifery, of chemistry, of materia medica and general therapeutics, of the institutions of medicine, of physiology and general pathology, of clinical medicine, and of clinical surgery; one six-months' course or two three-months' courses of medical jurisprudence, one three-months' course of botany, one three-months' course of hygiene, and a course of not less than twenty-five demonstrations upon microscopic anatomy, physiology, and pathology.

5. That he attended the general practice of a hospital in which are contained not less than fifty beds under the charge of not less than two physicians or surgeons, for not less than one and one-half years or three periods of not less than six months each.

6. That he has attended six cases of labor and compounded medicines for six months.

Each six-months' course shall have consisted of one hundred and twenty lectures except in the case of clinical medicine, clinical surgery, and medical jurisprudence.

Of four years' study required by this section, three six-months' sessions, at least, must be passed in attending upon lectures at a university, college, or incorporated school of medicine recognized by the board.

The first of such courses must have been attended during the session immediately succeeding the preliminary examination, and the last during the fourth year of study, and the candidates must undergo an examination on the final subjects of the curriculum at the end of the session in the fourth year of study (*ib.*, art. 3,985).

Members of Colleges.—All persons obtaining a license to practise from the College of Physicians and Surgeons of the

province are members of the college, but are not eligible for governors within four years from the date of their admission as members (*ib.*, art. 3,986).

Women.—The provincial medical board has power to make regulations respecting the admission of women to the study and practice of midwifery. Women who were legally qualified on the 31st of October, 1879, to practise as midwives in the province, while required to conform to the rules of said college, retain their right. Nothing in the act or the regulations shall prevent women in the country from practising midwifery or assisting at accouchements without being admitted to the study or practice of midwifery; but they must obtain a certificate from a duly licensed physician certifying that they have the necessary knowledge; and such certificate shall be registered in the register of the registrar; the council of discipline may annul it, if well-founded complaints are made against the person who had obtained it (*ib.*, art. 3,987 as amd. Act 1898, 61 Vict., c. 30, s. 2).

Register.—The medical board is required to cause to be kept by the registrar a register of persons duly licensed and registered, and who have complied with the law and the regulations of the board,[1] and those persons only whose names are inscribed therein are deemed to be qualified and licensed (*ib.*, art. 3,988).

The registrar is required from time to time to make the necessary alterations in the register (*ib.*, art. 3,989).

Evidence.—The registrar, under the direction of the board of governors, causes to be printed, published, and distributed to the members, from time to time, a copy, called *The Quebec Medical Register*, of the register, containing names, surnames, residences, medical titles, diplomas, and qualifications conferred by a college or other medical body, with the dates of the same. A printed copy, certified under the hand of the registrar as such, is *prima facie* evidence that the persons named and entered have been registered in accordance with this law. The absence of the name of any person from such copy is *prima facie* proof that such person has not been lawfully registered; provided always in case a person's name does not appear on such printed copy, a copy or extract from the register certified by the registrar of the college

[1] See n. 2, p. 664.

of the entry of such person's name on the register is proof that such person is duly registered (*ib.*, art. 3,990).

A certificate under the hand of the registrar of the payment of the annual contribution of members of the college is *prima facie* evidence that such payments have been made (*ib.*, art. 3,991).

Neglect to Register.—A person entitled to register who neglects to register is not entitled to practise medicine, surgery, or midwifery, or to claim any of the rights and privileges conferred,[1] and is liable for all penalties imposed for practising without registration, saving the right of certain members holding a license from the College of Physicians and Surgeons of Lower Canada (*ib.*, art. 3,992).

Established Practitioner.—A person who has attended medical lectures during three sessions of a medical school in the British possessions, and who has actually been engaged in the practice of medicine for over thirty years in the province, may, on proof of these facts to the satisfaction of the provincial medical board, and producing a certificate signed by two resident medical practitioners in the neighborhood where he has practised that he has succeeded in his profession, and is entitled to the consideration of the board, be entitled to a license and to registration without an examination (*ib.*, art. 3,993).

Unregistered Persons.—No person unless otherwise authorized is entitled to recover[2] any charge for medical or surgical advice, or professional service, or for the performance of any operation, or for any medicines prescribed or supplied, nor is he entitled to any of the rights or privileges conferred, unless he has registered according to law and paid his annual contribution to the college (*ib.*, art. 3,994).

No certificate required from any physician or surgeon or medical practitioner is valid unless the signer is registered (*ib.*, art. 3,995).

Persons Guilty of Felony.—Any registered member of the medical profession convicted of felony forfeits his right to

[1] On the practice in raising objection to failure, of a physician suing for compensation for services, to allege that he is registered and has paid his contribution, see Marien *v.* Huot, Que. Rap. Jud. Off. Cour Supérieure 15 (1898) "*doit être opposé par exception à la forme et non pas par inscription en droit.*"

[2] A physician cannot prove the call and necessity for his services by his own testimony. Dansereau *v.* Goulet, 26 L. C. Jur., 123; 11 R. L., 331; 5 L. N., 133, C. C.

registration, and the medical board causes his name to be erased from the register (*ib.*, art. 3,996).

If a person known to have been convicted of felony presents himself for registration, the registrar is required to refuse him registration (*ib.*, art. 3,997).

COUNCIL OF DISCIPLINE.—The Board of Governors may form a council, called Council of Discipline, of four governors selected by the board; and the president of the board shall also form *de jure* part of the council (*ib.*, art. 3,997 *a*, as added Act 1898, 61 Vict., c. 30, s. 3). The council is entrusted with trying, hearing, and deciding all accusations or complaints brought against a member of the college for any infringement of his professional duties or for acts derogatory to the honor of the profession (*ib.*, art. 3,997 *b*, as added by said act and chapter).

The council shall sit at Quebec or Montreal whenever required by the chairman or two members (*ib.*, art. 3,997 *c*, as added by said act and chapter).

The Board of Governors is authorized to make regulations and by-laws for the council, provided such by-laws shall not restrict the right of members of the corporation to practise their profession with a philanthropic or charitable object for the members of benevolent and mutual benefit associations and the charitable institutions of the province. Such regulations do not come into force until approved by the lieutenant-governor in council (*ib.*, art. 3,997 *f*, as added by said act and chapter).

The said act, 61 Vict. (1898), c. 30, prescribes the procedure before the Council of Discipline, and provides (art. 3,997 *g*) that if the council find the accusation well founded it may, according to the gravity of the case, condemn the accused to censure; or deprivation of the right to be elected governor of the college, or of the right of voting at elections of governors of the college for a certain time; or deprivation, for a certain limited and definite time, of the right to practise his profession; and (art. 3,997 *k*) it may condemn to such costs as it deems expedient the unsuccessful party, or divide such costs, and in addition may condemn such party to pay to the successful party a sum intended to indemnify him for personal expenses incurred respecting the complaint.

Appeal from judgments of said council imposing disciplinary punishments enumerated in art. 3,997 *g* may be taken within

fifteen days to the Board of Governors (*ib.*, art. 3,997 *l*, as added by said act and chapter).

The practice on such appeal is regulated by said act (61 Vict., c. 30, in arts. 3,997 *l* to 3,997 *n*). No other evidence than that adduced before the council is admitted on the appeal. The Board of Governors may confirm or pronounce the judgment which should have been rendered, and decide upon costs as well those in the first instance as those on appeal (*ib.*, s. 3,997 *n*, as added by said act and chapter). Provision is also made (art. 3,997 *p*, as added by said act and chapter) for the issue of execution from the Superior Court for costs not paid within fifteen days; if the costs do not reach $40 no execution against immovables can be issued.

Offences and Penalties.[1]—A person not entitled to register convicted of having practised [2] in contravention of this law, for reward or the hope of reward, is liable to a penalty of $50.[3]

A like penalty is incurred by every person assuming the title of doctor, physician, or surgeon, or any other name implying that he is legally authorized to practise, if unable to establish the fact by legal proof, and by every person who in an advertisement in a newspaper or in a written or printed circular, or on business cards or on signs, assumes a designation so as to lead the public to believe that he is duly registered or qualified; and by every person who offers or gives his services as a physician, surgeon, or accoucheur for gain or hope of reward, if he be not duly authorized and registered.

Burden of Proof.—In every prosecution, proof of registration is incumbent on the party prosecuted.[4]

[1] In a *qui-tam* action for a penalty for practising physic without a license, two witnesses to different acts of such practices is sufficient evidence to support the action. Puizé *v.* Fay, 2 Rev. de Lég., 280, K. B. (1812).

In a *qui-tam* action for a penalty for practising physic without a license, two witnesses to different acts of such practice is sufficient evidence to support the action. Puizé q. t. *v.* Fay, 1812, No. 412; 2 Rev. de Lég., 280.

[2] An unregistered person who sells remedies to one who comes and asks him for them, for a malady which the purchaser states he has, but which the seller does not diagnose, is not guilty of unlawful practice of medicine. Le Collège des Médecins, etc. *v.* Tucker, Que. Rap. Jud. Off. Cour Supér., vol. xvii., p. 70 (1899).

[3] Where one penalty is asked, and two offences proved, it cannot be said that no penalty is due because two have been incurred. Coll. of Phys. & Surg. *v.* Garon, 6 Mont. Leg. N., 61 (1883).

[4] On the relative credibility of the testimony of one accused of unlawful practice and of his accuser, see Le Collège des Médecins, etc. *v.* Tucker, Que. Rap. Jud. Off. Cour Supér., vol. xvii., p. 70 (1899).

Witnesses.—Members of the college are not incompetent witnesses by reason of their membership.[1]

Prosecution.—The penalties may be recovered with costs in an ordinary civil suit in the name of the College of Physicians and Surgeons of the Province of Quebec before any circuit court of the county or of the district in which the defendant is domiciled, or in which the offence was committed, *or by a prosecution before a justice of the peace in conformity with the provisions of Part LVIII. of the Criminal Code, 1892* (*ib.*, art. 3,998, as amended, 1898, c. 30, s. 4).[2]

Costs.—The court imposing a penalty adds costs, and, in default of payment within a delay which it fixes, condemns the defendant to imprisonment in a common jail of the district for sixty days (*ib.*, art. 3,998, as amd., Act 1898, 61 Vict., c. 30, s. 4).

Evidence.—In cases where proof of registration is required, the production of a printed or other copy or extract from the register, certified under the hand of the registrar of the college, is sufficient evidence that all persons named therein are registered practitioners and any certificate upon such proof, or other copy of the register or extract from such register, purporting to be signed by any person in his capacity of registrar of the college, is *prima facie* evidence that such person is registrar without proof of the signature or of his being in fact such registrar (*ib.*, art. 3,999).

Homœopathists.—The rights of homœopathists are not affected by the foregoing sections (*ib.*, art. 4,002).

The homœopathic physicians and surgeons of the province form a corporation under the name of the Montreal Homœopathic Association (*ib.*, art. 4,003).

The corporation has power to appoint three medical graduates of a British or provincial university or medical licentiates of a British or provincial college or board legally incorporated to be a board of examiners, to examine all persons who may desire to obtain a license to practise homœopathic medicine (*ib.*, art. 4,008).

[1] See n. 4, p. 669.

[2] This appears to be the effect of Act 1898, c. 30, s. 4, amending Art 3,998. The words in italics were added, however at the end of the sections (see Costs, below), so that at first right it would appear that the failure to pay the penalty and costs imposed subjected the offender to the criminal prosecution.

A person desiring to be examined touching his qualifications to practise according to the doctrines and teaching of homœopathy shall give notice in writing of at least one month to the secretary or treasurer of the association, and show that he is not less than twenty-one years of age; has followed medical studies for not less than four years under the care of one or more duly qualified medical practitioners; has attended at some recognized university or incorporated school of medicine not less than two six-months' courses of anatomy, physiology, surgery, theory and practice of medicine, midwifery, chemistry, materia medica, and therapeutics respectively, and not less than one six-months' course of clinical medicine and medical jurisprudence respectively, or their equivalents in time; and shall have complied with the regulations of such university or incorporated school of medicine with regard to such courses, and shall have followed such other course or courses as may hereafter be considered by the board of examiners requisite for the advancement of a medical education.

All such persons shall, at a regularly appointed time and place, be examined on all the aforesaid branches by the board of examiners (*ib.*, art. 4,009).

If the board be satisfied by examination that a person is duly qualified to practise either or all of said branches of medicine, as taught and practised by homœopathists, they shall certify the same under the hands and seals of two or all of such board.

The lieutenant-governor, on receipt of such certificate, may, if satisfied of the loyalty, integrity, and good morals of the applicant, grant to him a license to practise medicine, surgery, and midwifery, or either of them, conformably to the certificate, and all such licensees are entitled to all the privileges enjoyed by licentiates of medicine (*ib.*, art. 4,010).

The corporation appoints a secretary who keeps a register of names of all persons duly licensed to practise medicine, surgery, and midwifery, or either of them, according to the doctrines and teachings of homœopathy.

Only those whose names are inscribed in said register are qualified and licensed to practise according to the doctrines and teachings of homœopathy (*ib.*, art. 4,015).

The said secretary is required to make the necessary altera-

tions in the addresses or qualifications of the persons registered (*ib.*, art. 4,016).

OFFENCES AND PENALTIES.[1]—A person practising according to the homœopathic doctrines for reward in contravention of this act, or assuming a title implying that a person is legally authorized to practise according to homœopathic doctrines, if unable legally to establish such authorization; or by advertisement published in a newspaper or in a written or printed circular, or on business cards or signs, assuming a designation to lead the public to believe that he is duly registered and qualified to practise according to the doctrines of homœopathy; or offering or giving his services as physician, surgeon, or accoucheur for gain or hope of reward, if not duly authorized or registered, is punishable with a penalty of $50.[2]

BURDEN OF PROOF.—In every prosecution, the proof of registration is incumbent on the party prosecuted.[3]

COSTS.—The court may condemn the defendant to pay $50 in addition to costs within a delay which it determines, and to imprisonment of sixty days in a common jail of the district on default of payment within the delay (*ib.*, art. 4,017).

WITNESSES.—A member of the corporation is not an incompetent witness on account of his membership (*ib.*, art. 4,018).[3]

FEES.—The provincial board of medical examiners may establish examination fees (*ib.*, art. 3,981).

Members of the College of Physicians and Surgeons of the Province of Quebec are required to pay an annual fee of $2 (*ib.*, art. 3,986).

YUKON.

TITLE: The ordinance is styled "The Yukon Medical Ordinance," Cons. Ord. Yukon 1902, c. 48, s. 1.

COLLEGE OF PHYSICIANS, ETC.—The members of the medical profession are a body corporate, styled "The College of Physicians and Surgeons of the Yukon Territory" (*ib.*, s. 2). Every person registered under the ordinance is a member (*ib.*, s. 3). All persons duly licensed to practise in the Territory at the passage of the ordinance (1898) are also members (*ib.*, s. 4).

COUNCIL.—The ordinance provides for a council of the col-

[1] See n. 1, p. 669.
[2] See n. 3, p. 669.
[3] See n. 4, p. 669.

lege, to be appointed as prescribed by it, and regulates elections for the council in detail (*ib.*, s. 5–24). There is an executive committee of the council with powers delegated to it by the council and power to take action on matters requiring immediate interference (*ib.*, s. 26).

FORMER PRACTITIONERS.—Persons duly and legally licensed to practise at the time of the passage of the ordinance (1898) are entitled to register without fee (*ib.*, s. 29).

REGISTRATION.—The council shall cause to be kept by the registrar, a register, for registration of every person registered under this ordinance. Only those persons whose names are in the register are deemed qualified and licensed to practise medicine, surgery, or midwifery in Yukon Territory. The register is at all times open and subject to inspection by any person (*ib.*, s. 30).

The registrar is required from time to time to make the necessary alteration in the addresses and qualifications of persons registered (*ib.*, s. 31).

QUALIFICATIONS.—The council is required to admit upon the register: (*a*) Any person who at the time of his application shall furnish proof that his name is on the register in Great Britain and Ireland; (*b*) any person duly licensed by the proper authority in that behalf to practise medicine and surgery in any province or territory of Canada or in any British colony; (*c*) any person who shall produce from any recognized college or school of medicine and surgery a certificate or certificates that he has taken a four-year course of study or a diploma of qualification from such recognized college or school, provided the applicant shall furnish to the council satisfactory evidence of identification and pass before the members thereof, or such examiners as may be appointed for the purpose, a satisfactory examination touching his fitness and capacity to practise as a physician and surgeon, on payment to the registrar of a fee of $100 (*ib.*, s. 32).

EXAMINATIONS.—The council is empowered to prescribe the subjects and modes of examination not contrary to the ordinance (*ib.*, s. 34).

ERASURE.—If any registered medical practitioner shall be convicted of any felony or misdemeanor, or shall after an inquiry be judged by the council to have been guilty of infamous conduct in any professional respect, such council may, if it sees

fit, direct the registrar to erase the name of such practitioner from the register (*ib.*, s. 35).

COMPENSATION.—Every person registered and duly licensed under the provisions of this ordinance shall be entitled to practise medicine and surgery, including midwifery, or any one of them as the case may be, in the Territory, and to demand and recover, in any court in the Territory, with full cost of suit, reasonable charges for professional aid, advice, and visits, and the cost of any medicine or surgical appliance rendered or supplied by him to his patients (*ib.*, s. 36).

LIMITATION.—No duly registered member of the college shall be liable to any action for negligence and malpractice by reason of professional services requested or rendered, unless commenced within one year after such professional services, in the matter complained of, terminated (*ib.*, s. 37).

REGISTER.—The law provides for the publication of the register from time to time, containing names, residences, medical titles, diplomas, and qualifications conferred by any college or body. The register is called "The Yukon Territory Medical Register." A copy of the register for the time being, properly attested by the registrar or president, shall be *prima facie* evidence in all courts and before all justices of the peace and all others, that the persons therein specified are registered under this ordinance. The absence of a name is *prima facie* evidence that such person is not so registered (*ib.*, s. 38). In case a name does not appear in such copy, a certified copy under the hand of the registrar, of the entry of the name on the register, is evidence that the person named is so registered (*ib.*, s. 38, subs. 2).

OFFENCES; PENALTIES.—A person entitled to register who neglects or omits to register is not entitled to any of the rights or privileges conferred by registration, so long as the neglect or omission continues, and shall be liable to all penalties imposed by this ordinance or any other ordinance in force against unqualified or unregistered practitioners (*ib.*, s. 39).

It is unlawful for any person not registered to practise medicine or surgery or midwifery for hire or hope of reward. If any such person so practises, or professes to practise, medicine, surgery, or midwifery, upon summary conviction before a justice of the peace he is liable to a penalty not exceeding $100 for any and every such offence (*ib.*, s. 40).

A person who wilfully or falsely pretends to be a physician, doctor of medicine, surgeon, or general practitioner, or assumes any titles, additions, or description other than he possesses, is liable, on such conviction, to a penalty not exceeding $100 and not less than $50 (*ib.*, s. 41).

Any person not registered pursuant to this ordinance, who takes or uses any name, title, addition, or description implying or calculating to lead people to infer that he is registered under this ordinance, or that he is recognized by law as a physician, surgeon, or licentiate in medicine, surgery, or midwifery, is liable, on such conviction, to a penalty not exceeding $100 nor less than $25 (*ib.*, s. 42).

DISQUALIFICATIONS.—No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, or for attendance, or for the performance of any operation, or for any medicine which he may have prescribed unless he is registered under this ordinance, except in cases falling within the proviso of sec. 46 (*ib.*, s. 43).

No person shall be appointed as medical officer, physician, or surgeon in any branch of the public service of the Territory or in any hospital or other charitable institution unless he is registered under this ordinance (*ib.*, s. 44).

No certificate required by any present (1898) or future ordinance, from any physician or surgeon or medical practitioner, shall be valid unless the signer is so registered (*ib.*, s. 45).

PROSECUTIONS—EMERGENCY.—Prosecutions may be before one or more justices of the peace. Costs may be awarded in addition to the penalty. The offender may be committed to the common gaol, in default of immediate payment of penalty and costs, for a term not exceeding one month, unless sooner paid; *provided*, if it shall appear on any prosecution under this ordinance that by reason of unforeseen and sudden sickness or accident any person has needed medical or surgical treatment, and that no medical practitioner qualified under this ordinance then resided within ten miles of the place where such person needed treatment, the judge or other presiding magistrate may dismiss the complaint against any person who under such circumstance rendered medical or surgical assistance, and may order the costs to be paid by the complainant (*ib.*, s. 46).

In prosecutions under the ordinance the burden of proof as to registration is on the person charged (*ib.*, s. 47).

Every prosecution must be begun within six months from the alleged offence (*ib.*, s. 49).

Any person may be prosecutor or complainant (*ib.*, s. 51).

Evidence.—In all cases where proof of registration under this ordinance is made, a printed or other copy of the register, certified under the hand of the registrar, for the time being, shall be sufficient evidence of *all persons* (*sic!*) in lieu of the production of the original register; any certificate on such printed or other copy of the register, signed by any person in his capacity of registrar of the council, under this ordinance is *prima facie* evidence that such person is such registrar, without any proof of his signature or of his being in fact such registrar (*ib.*, s. 48).

Stay.—The council by an order signed by the president and under its seal may stay proceedings in any prosecution under this ordinance where it is deemed expedient (*ib.*, s. 50).

Definition.—The words "legally qualified medical practitioner," or other words implying legal recognition of any person as a medical practitioner, in any ordinance or law applied to this Territory, mean a person registered under this ordinance (*ib.*, s. 53).

Council; Additional Powers.—The council may by by-law delegate to the registrar the power to admit and to register any person having the necessary qualifications entitling him to be registered by the council; it may at any time direct the name of any person improperly registered to be erased from the register (*ib.*, s. 55).

The council may from time to time make, alter, or amend and repeal rules and regulations for the promotion of medical and surgical knowledge (*ib.*, s. 56).

Homœopathic Physicians.—These may be registered under this ordinance on complying with the terms of sec. 34 (*ib.*, s. 57).

Return of Transactions of Council Respecting Charges for Professional Services.—The council is required to make immediate return to the Commissioner of Yukon Territory in council showing all orders, regulations, by-laws, or other transactions relating to charges for professional services by members of the college (*ib.*, s. 58).

FEES.—For registration under any clause of the ordinance $100 (*ib.*, s. 54).

From each member of the college, to the registrar of his deputy to receive it, an annual fee not less than $5 nor more than $20, as may be determined by by-law of the council, toward the general expenses of the college; deemed a debt, recoverable with costs in the name of the college in the territorial court (*ib.*, s. 33).

For examination under subsec. (*c*) of sec. 32, to the registrar $100, for the expenses of the examining board (*ib.*, s. 33, *c*).

APPENDIX

TO SYNOPSIS OF THE LAWS REGULATING THE PRACTICE OF MEDICINE AND SURGERY.

CHANGES IN THE STATUTES.—The New York State Library, Albany, N. Y., issues annual bulletins containing and entitled *Summary and Index of Legislation* and *Review of Legislation.* The annual changes in the medical laws throughout the United States are there noted under the title Public Health, State Control of Medicine, catalogue number 944. The allied subjects of optometry, osteopathy, etc., have the following catalogue numbers. The subject of nursing is treated under catalogue No. 1,575.

NOTE: The activity of the legislatures in changing the laws on this subject was mentioned in the introductory note (page 178 n. 2); it is illustrated by the fact that the most of the following changes in the statutes were made and published too late to be inserted in their proper places in the foregoing synopsis.

ARKANSAS. (See *supra*, p. 187.)

After this work was in press, a "Digest of the Statutes of Arkansas," by William F. Kirby, authorized by the legislature, was published, dated 1904. The medical law is in secs. 5,231–5,245, the law respecting malpractice and unprofessional conduct is in secs. 5,246–5,250, the law respecting osteopathy in secs. 5,251–5,260, of ch. 109 of this Digest. The act authorizing the Digest and its publication (May 20th, 1903) does not, in terms, give it the force of law; the Digest does not change the terms of the law as abstracted in the above synopsis, though the sequence of the sections is somewhat changed. We have therefore adhered to the laws as they were enacted by the legislature, instead of referring to the sections of this Digest.

One member of each board is required by the law to be selected from each congressional district in the State.

CALIFORNIA. (See *supra*, p. 194.)

(Privileged Communications, see p. 101.) The California law of privileged communications, as contained in the text, has been declared unconstitutional (owing to the method of its adoption). The law, as published in the Code of Civil Procedure of 1903, is, it seems, not open to the same objection, and this law designates the person whose testimony is privileged as a *licensed physician or surgeon.*

(Medical Laws, see *supra*, p. 194). The words "*some suitable graduate* in medicine" in the county government act designating the qualifications of a county physician mean one legally licensed to practise medicine and surgery under the laws of this State (though he may not have received a diploma from a medical college). People *v.* Eichelroth (Supr. Ct. of Cal., 1889), 20 Pac. R., 364; 2 L. R. A., 770.

Dentistry is but a special branch of the medical profession; the power of the State to regulate as to both in the interests of the public is equally clear. *Ex parte* Whitley, 77 Pac. R., 879 (Supr. Ct. of Cal., 1904) an exemption in favor of those practising at the time of the passage of the act is not unconstitutional (*ib.*) (citing State *v.* Randolph, 23 Or., 74; State *v.* Creditor, 44 Kan., 565; *ex parte* Spinney, 10 Nev., 323; People *v.* Phippin, 70 Mich., 6; State *v.* Green, 112 Ind., 462; State *v.* Vandersluis, 42 Minn., 129; Wert *v.* Clutter, 37 Ohio St., 348; 22 Am. & Eng. Enc. Law, 2d ed., 781, and distinguishing State *v.* Hinman, 65 N. H., 103; State *v.* Pennoyer, 65 N. H., 113; Scholle *v.* State, 90 Md., 740). Such legislation is neither special nor class, and does not violate any provision of State or federal constitution (*ib.*). Such a law might limit practitioners to college graduates (*ib.*) (*cf.* p. 319, n. 1). The power conferred on the board to pass on the reputability of a college is not judicial power in the constitutional sense (*ib.*). Such a law is not unconstitutional because such power may be arbitrarily exercised (*ib.*). What is reputable in a college must be determined from the standpoint of men of scientific attainments (*ib.*) (citing Wisconsin *v.* Chittenden, 112 Wis., 558).

COLORADO. (Superseding *supra*, pp. 203, 204, 205.)

NOTE: After the abstract of the former law, (see p. 203,) was cast for printing, the legislature passed the following amendments, approved April 20th, 1905. This law supersedes that on pp. 203, 204, 205, except as below indicated.

REPEAL.—The Act of 1905 does not in terms repeal the whole former medical law (*supra*, p. 203 *et seq.*). It does, however, so amend it that it would seem that the law of 1905 entirely supersedes the said former law. See *infra* p. 685, title REPEAL.

BOARD OF MEDICAL EXAMINERS.—The board consists of nine members appointed by the Governor. The members of the board are now required to be practising physicians of integrity and ability, residents of the State, and duly licensed to practise medicine in the State, and to be graduates of medical schools of high

educational requirements and standing, and to have been engaged in the active practice of their profession within the State for at least five years (Act 1905, c. 135, s. 1, 2). The amending act struck out all provisions requiring the members of the board to belong to any particular school of practice.

The board is required to keep on file with the secretary of State, for public inspection, a copy of their schedule for educational requirements and rules and regulations (*ib.*, s. 3).

The board has authority to administer oaths, to summon witnesses, and to take testimony in all matters relating to their duties (*ib.*, s. 5).

QUALIFICATIONS.—The board is required to adopt, from time to time, a schedule of minimum educational requirements, which shall be without prejudice, partiality, or discrimination as to schools or systems of practice of medicine (*ib.*, s. 3).

When an applicant for license offers to the board satisfactory proof that he has complied with such educational requirements as are specified in said schedule, the board shall accept such proof as sufficient evidence of the educational qualifications of the applicant to entitle him to a license without examination. At no time shall said schedule for graduates after January 1st, 1900, specify the attendance upon less than four full courses of instruction in four separate years in a reputable medical school (*ib.*, s. 3).

A person wishing to obtain the right to practise medicine, and not heretofore (April 20th, 1905) licensed, shall, before it shall be lawful for him to practise medicine, make application to the board, through its secretary-treasurer, upon such form and in such manner as shall be adopted and prescribed by the board, and obtain from the board a license so to do. Unless such person shall have obtained a license as aforesaid, it shall be unlawful for him to practise medicine in the State, and he shall be deemed to have violated the provisions of the act if he shall practise medicine in the State without first having obtained such license. All applicants for such license, or for a renewal of any such license which has been revoked, shall furnish the board with satisfactory evidence of good moral character (*ib.*, s. 4).

LICENSES.—The board is required to issue licenses to practise medicine to all persons who furnish satisfactory evidence of attainments and qualifications under the provisions of this act and

the rules and regulations of the board (*ib.*, s. 5). Such licenses, signed by the president and attested by the secretary-treasurer of the board under its seal, are absolute authority to the persons to whom they are issued to practise medicine in the State (*ib.*, s. 5).

Prosecution.—It is the duty of the secretary-treasurer, under direction of the board, personally or by deputy, to aid the district attorneys in the enforcement of the act, and in the prosecution of all persons charged with violating any of its provisions (*ib.*, s. 5).

Examinations.—Examinations of applicants for licenses shall be made by the board according to the method deemed by it to be the most practicable and expeditious to test the applicant's qualifications. The applicant shall be designated by a number instead of his name, so that his identity will not be disclosed to the members of the board until after the examination papers are graded. The subjects of written, oral, or clinical examinations shall be anatomy, physiology, chemistry, symptomatology, toxicology, pathology, surgery, and obstetrics (exclusive of materia medica and therapeutics). The credentials of applicants relating to their general reputation, their preliminary education and the courses of study they have pursued, the degrees they have received, the number of years they have been engaged in the lawful practice of medicine, their experience in general hospitals, medical departments of the army, navy, and public health and marine hospital service, licenses granted to them by other States and countries, and their experience as teachers of medicine, shall be given due consideration by the board in conducting its examinations. Upon investigation of an applicant's credentials, the board shall, when convinced that an applicant is qualified to practise medicine, grant him a license thereon without further examination. Each applicant shall name his system of practice, and no person shall use the name of any system unless he holds a certificate from the State association of such system (*ib.*, s. 7).

Recording.—Every person who shall receive a license from the board shall have it recorded in the office of the recorder of deeds of the county in which he resides, and shall likewise have it recorded in the counties to which he shall subsequently remove for the purpose of practising medicine. The failure of the holder

to have his license recorded before he shall begin the practice of medicine in the State shall render it null and void (*ib.*, s. 8). The county recorders are required to keep for public inspection a complete list and description of the licenses recorded by them; they are required to stamp licenses with the date of their presentation for record (*ib.*, 9).

Refusal—Revocation.—The board may refuse to grant or may revoke a license or may cause a licentiate's name to be removed from the record in the office of any recorder of deeds upon any of the following grounds: the employment of fraud or deception in applying for a license or in passing the examination provided for in this act; the practice of medicine under a false or assumed name, or the personation of another practitioner of a like or different name; the conviction of a crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate for performance of professional duties; procuring or aiding or abetting in procuring a criminal abortion; obtaining a fee on the representation that a manifestly incurable disease can be permanently cured; causing the publication and circulation of an advertisement of any medicine or means whereby the monthly periods of women can be regulated or the menses if suppressed can be reëstablished; causing the publication and circulation of an advertisement relative to any disease of the sexual organs.

The applicant or licentiate whose license may be so refused or revoked for such cause is entitled to a copy of the complaint, and to a hearing before said board in person or by attorney, and witnesses may be examined as to his guilt or innocence.

The board may at any time within two years after such refusal or revocation or cancellation of revocation, by a majority vote, issue a new license or grant a license to the person affected, restoring or conferring all the rights and privileges of and pertaining to the practice of medicine as defined and regulated by this act (*ib.*, s. 10).

Definition.—The terms *practice of medicine, to practise medicine, practising medicine,* and *practise medicine* are defined to mean holding one's self out to the public as being engaged in the State, in the diagnosis and treatment of diseases or injuries of human beings; or the suggestion, recommendation, or prescribing of any form of treatment for the intended palliation, relief, or cure of

any physical or mental ailment of any person, with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; or the maintenance of any office for the reception, examination, and the treatment of any person suffering from disease or injury of body or mind; or attaching the title of M.D., surgeon, doctor, or any other word or abbreviation to his name indicative that such person is engaged in the treatment or diagnosis of the diseases or injuries of human beings (*ib.*, s. 11).

Violations.—If any person shall hold himself out to the public as being engaged within this State in the diagnosis and treatment of diseases or injuries of human beings, or shall suggest, recommend, or prescribe any form of treatment for the palliation, relief, or cure of any physical or mental ailment of any person with the intention of receiving therefor either directly or indirectly any fee, gift, or compensation whatsoever, or shall maintain an office for the reception, examination, and treatment of diseased or injured human beings, or shall attach the title of M.D., surgeon, doctor, or any other word or abbreviation to his name, indicative that he is engaged in this State in the treatment of diseased or injured human beings, and shall not in any of these cases theretofore have received, or shall not in any of these cases then possess in full force and virtue a valid license to practise medicine under the laws of this State, he shall be deemed to be practising medicine without complying with the provisions of this act, and in violation hereof (*ib.*, s. 11).

Exceptions.—The act does not prohibit gratuitous service in case of emergency, nor the practice of the religious tenets or general beliefs of any church whatsoever not prescribing medicine or administering drugs, nor apply to commissioned surgeons of the United States army, navy, or public health and marine hospital service while so engaged, nor to regularly licensed physicians called from other States or Territories to attend specific cases in this State, nor the practice of dentistry, nor of osteopathy, when not prescribing medicine or administering drugs (*ib.*, s. 11).

Offence—Penalty.—Any person practising medicine in this State without complying with the provisions of this act, or any person who shall have violated the provisions of this act, shall be guilty of a misdemeanor, and punishable by a fine of

from $50 to $300, or by imprisonment in the county jail for not less than ten days nor more than thirty days or by both (*ib.*, s. 12).

Any person presenting or attempting to file as his own the diploma or certificate or credentials of another, or who shall give either false or forged evidence of any kind to the board or any of its members, in connection with an application for a license to practise medicine, or who shall practise medicine under a false or assumed name, or shall falsely personate another practitioner of a like or different name, shall be guilty of a felony, and punishable by imprisonment in the State penitentiary for not less than one nor more than ten years at hard labor (*ib.*, s. 12).

Fees.—To the secretary-treasurer of the board by each applicant for a license (to accompany the application), $25; two-fifths of which shall be returned to the applicant in case the board shall refuse to grant him a license (*ib.*, s. 6).

To the secretary-treasurer, on restoration of rights and privileges under sec. 10, upon the issuance of a new license, $10 (*ib.*, s. 10).

Repeal.—The Act of 1905, c. 135, specifically repeals sec. 2 of Act April 7th, 1885. It appears, however, to be inconsistent with and therefore to have superseded the entire previous law, abstracted on pp. 203 to 205 *supra*.

Nursing.—There is a law (1905, c. 136) regulating the practice of professional nursing. It is not within the scope of this article.

Connecticut. (See *supra*, p. 205.)

There is a law (1905, c. 120) regulating the practice of professional nursing of the sick.

District of Columbia. (See *supra*, p. 214.)

License of Practitioners from Other States, etc. (See page 218).—The board of medical supervisors of the District of Columbia is authorized and directed to license to practise medicine and surgery in the District, without examination, any applicant for such license who has been engaged in the practice of medicine and surgery in any other jurisdiction, whether a State, Territory, or insular possession of the United States, or a

foreign country, subject to the following conditions: (*a*) No applicant shall be licensed who is not of good moral character and free from mental defects and drug habits liable to interfere with the proper practice of medicine and surgery; (*b*) nor who, at the time of making application, and for not less than two years prior to the date thereof, has not been lawfully authorized to practise medicine and surgery, and actually engaged in such practice, in the jurisdiction where he resides; (*c*) nor unless the applicant acquired the right to practise medicine and surgery in such jurisdiction under conditions equivalent to those with which he would have to comply in order then to have practised medicine and surgery in the District of Columbia; (*d*) nor unless the jurisdiction by virtue of whose license the applicant seeks exemption from examination in the District of Columbia, grants to licentiates of the board of medical supervisors of said District privileges equivalent to those which the applicant seeks; (*e*) nor until the applicant has paid to the board of medical supervisors such fee as may be fixed and required by the regulations of the board, but not more than the fee charged under similar circumstances by the jurisdiction by virtue of whose license the applicant seeks exemption from examination (*ib.*, s. 8a, as inserted by Act of Congress, January 19th, 1905, Public Act No. 16, session 1904–5).

Certificates for Procurement of Licenses in Other Jurisdictions.—Said board is authorized and directed to issue in favor of its licentiates such certificates, if any, as may be necessary to enable such licentiates, without examination, to obtain licenses to practise medicine and surgery in other jurisdictions and to collect for the issue of such certificates such fees as may be necessary to defray the cost of issuing the same, and to use such fees for that purpose (*ib.*).

Other Powers of the Board Under Sec. 8a.—Said board is further authorized to determine all matters of fact required to be determined in the execution of the provisions of this section (*ib.*).

Fees (see *supra*, p. 220).—To the board from applicant from other State, etc., under sec. 8a (see sec. 8a *supra*).

To the board for certificates to its licentiates to enable them to obtain licenses in other jurisdictions (see sec. 8a, *supra*).

FLORIDA. (See *supra*, p. 220.)

STATE BOARDS OF EXAMINERS.—The Governor appoints a State board of medical examiners, and also a State board of homœopathic medical examiners (Rev. Stats., s. 801, as amd. Act 1905, c. 5,426).

The State board is composed of seven regular practising physicians who have been duly licensed to practise in the State, no two members residents of the same judicial circuit. The homœopathic board is composed of three practising homœopathic physicians, graduates in good standing of some medical college recognized by the American Institute of Homœopathy (*ib.*, s. 802, as amd. 1905, c. 5,426)[1]. Each board is required to meet regularly semi-annually at some central and convenient point in the State to conduct examinations and grant licenses; and to give at least one month's public notice of their meeting by publication once a week in a newspaper of general circulation throughout the State (*ib.*, s. 805, as amd. 1905, c. 5,426).[1]

BOARD OF ECLECTIC MEDICAL EXAMINERS.—The Governor shall appoint a board of eclectic medical examiners for the State at large, composed of three practising eclectic physicians of known ability, who shall be graduates of a college of the Eclectic School of Medicine (Laws 1899, c. 4,698, s. 1). Said board shall be authorized to examine all applicants who shall present a certificate of graduation (showing that such applicant has taken not less than a two-years' course) from some college of the Eclectic School of Medicine, and shall not have authority to examine any applicant from any other school of medicine (*ib.*, s. 2). The duties of the board of eclectic medical examiners as to organization, time and place of meeting, and in all other respects, except as stated in this bill, shall be the same as the powers conferred by law on the board of homœopathic medical examiners, provided that said board may meet in any city of the State (*ib.*, s. 3, as amd. Act 1901, c. 5,008).

FEE.—The examination fee from each applicant, whether certificate is granted or not, is $15 (*ib.*, s. 810, as amd. 1905, c. 5,426).[1]

LICENSE TAX.—Regular practising physicians and surgeons

[1] These provisions supersede the provisions of secs. 801, 802, 805 and 810, as found in the text, pp. 220, 221.

in the State are exempt from the payment of any license tax for practising their profession (Act 1905, c. 5,481, in effect Sept. 30th, 1905).

Evidence.—When one contends that he has made new discoveries in science or art, opposed to the general experience of man for ages, and directly in conflict with the generally accepted rules, and seeks to gain money or secure profit thereby, the burden of proof of the truth of such discovery is on the person making the claim, and the truth of such contention must be satisfactorily proved before it can be accepted. (Charge of Locke, D. J., U. S. District Ct., Fla., in U. S. *v.* Post, 128 Fed. R., 950.)[1]

On the character of evidence necessary to establish the claims of a *mental healer* claiming to cure by absent treatment, and the reasons for disbelieving and disregarding positive evidence in favor of those claims, given under oath, where there is no contradictory evidence, see the same charge.

Hawaii. (See *supra*, page 228, and *infra*, page 707.)

Revision.—The laws of Hawaii were revised by a commission appointed under Hawaii laws 1903, Act 45. The commission was required to compile the statute laws as they should exist after the adjournment of the session of the legislature in 1903, and to present the compilation to the legislature at its next session (1905). The compilation was published by the commission under date February 1st, 1905. As this goes to press, the session laws of 1905 have not been published. The changes effected by the commission in the medical law so far as pertinent to this synopsis were as follows: The law is comprised in secs. 1,068–1,077 of the revision. In former section 827 *only* is transferred from before to after *be granted; on June 8, 1896,* is substituted for *at the time of the passage of this act.* In former sec. 830, *Governor* is substituted for *Minister of the Interior; in the manner prescribed in Section 80 of the organic act* is inserted after the word *appoint.* From former sec. 833 *whether granted under the provisions of this act or of any act heretofore existing* is omitted. *Territory* is substituted for *republic.* The license is required to be obtained from the treasurer [a compliance with the Act of Congress], and the power of revocation is conferred on him. Otherwise the law appears to be unchanged by the commission. The law as it existed before the compilation, is abstracted here, because the

[1] In trial of a *mental healer* for use of mails to defraud.

law creating the commission did not give their labors the force of law. See *infra*, p. 707.

IDAHO. (See *supra*, p. 231.)

Under sec. 5 of Act 1899, the board could not require an applicant under that section to furnish it with his diploma. The board could not ignore the plain provisions of that section, and refuse a license to an applicant entitled under that section, because they would not recognize his diploma as from a reputable institution. They could not thus make a criminal of a citizen engaged in a lawful business. He was not obliged upon such refusal to resort to his appeal from their action. He could, being entitled to a license and having complied with all the legal requirements to obtain one, continue in practice, notwithstanding the board's refusal to grant him a license, and for so continuing he would not be liable to prosecution. State *v.* Cooper (Supr. Ct. of Idaho, June 24th, 1905), 81 Pac. Rep., 374.

INDIANA. (See *supra*, p. 243.)

(Page 243, eleventh line). There are now *six* members instead of *five*. (Act 1905, c. 115.)

One member shall be a reputable practising physician and a graduate of a reputable school or college of the system by which he practises, and shall belong to some school or system of practice other than those which are now (March 4th, 1905) represented on the board, and his successor shall in the future always be of some school different from that of the remaining members of the board (added by Act 1905, c. 115).

OSTEOPATHY.—Any osteopathist now (March 4th, 1905) practising in and a resident of Indiana, and holding a diploma from a reputable college of osteopathy, as determined by the State board of medical registration and examination, shall be eligible to an examination on proper application to the board; and should he pass this examination he shall be granted a certificate for a license forthwith to practise osteopathy in Indiana (Act 1905, c. 115).

IOWA. (See *supra*, p. 258).

The intention of the legislature was to divide those who shall be deemed practising medicine into: (1) All who profess to be a physician, surgeon, or obstetrician, and assume the duties; (2) those who shall make a practice of prescribing or prescribing and furnishing medicine for the sick; (3) those who shall publicly profess to cure or heal. A mere public profession of an ability

to heal would not subject any one to the penalties of the law. Such profession (in order to incur the penalty) must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. State *v.* Heath (Supr. Ct. of Iowa, 1904), 101 N. W. R., 429.

One publicly professes in announcing to the public generally his claim of skill in the art of healing, and is guilty under sec. 2,580 (*supra*, p. 265) if without a certificate, and not within the statutory exceptions, this is done with the purpose of treating the maladies of patients who may engage his attention (*ib.*).

The public profession that he will cure or heal may be proven without exacting evidence that he has actually undertaken to do so (*ib.*), citing State *v.* Van Doran, 109 N. C., 864 (*supra*, p. 409 *et seq.*).

The legislature may prescribe such restrictions and regulations as in its judgment shall protect the people from the consequences of ignorance or incapacity, as well as deception and fraud (*ib.*).

The statutes do not attempt to discriminate between different schools of medicine or systems for the cure of disease. No method of attempting to heal the sick, however occult, is prohibited; but the practitioner must be possessed of a certificate from the board, and exercise such reasonable skill and care as are usually possessed by practitioners in good standing, of that system in the vicinity where they practise (*ib.*). This excludes no one from the profession, but requires all to attain reasonable proficiency in certain subjects essential to the appreciation of physical conditions to be affected by treatment (*ib.*). The object is not to make any particular method of effecting a cure unlawful, but to protect the community from the evils of empiricism (*ib.*). If no medicine is to be used, proficiency in materia medica, therapeutics, and the principles and practice of medicine is not required (*ib.*). This case collates the cases on magnetic healers, those reaching a contrary conclusion, and those on Christian Science. In this case it was *held* that where the accused advertised magnetic, mental, and absent treatment, and his advertisement showed that he publicly professed to heal, for the purpose of procuring andtreating patients, the question of his guilt should have been submitted to the jury.

In State *v.* Edmunds (Supr. Ct. of Iowa, 1904), 101 N. W. R., 431, are collated the cases showing the application of the medical acts to magnetic healers, empirics, obstetricians, midwives, Christian Scientists, osteopaths, and itinerant practitioners.

Method in the definition is not confined to methods similar to the administration of a medicine or drug; it includes dieting, exercising, and prescribing glasses or spectacles. State *v.* Edmunds, 101 N. W. R., 431.

The act confines the practice to the school or schools regarded as lawful, and does not permit quacks and charlatans to impose upon the public (*ib*).

If one practises as an itinerant physician, the certificate from the State board is no protection (*ib*). It is doubtful whether a non-resident may obtain his certificate, maintain his residence in another State, and practise his profession here without obtaining the additional license required by sec. 2,581 (*ib.*). See this case for a discussion of the form of indictment. The

practice of medicine is a privilege, not a right, and the State may tax it as an occupation at any sum it may see fit (*ib.*).

The law imposing the license tax on itinerant physicians is constitutional (*ib.*).

KANSAS. (See *supra*, p. 268.)

Meffert *v.* Medical Board, 66 Kan., 710 (*supra*, p. 268), was affirmed by the Supreme Court of the United States in 195 U. S., p. 625, under name Meffert *v.* Packer.

KENTUCKY. (See *supra*, p. 276.)

In Brown *v.* Young, 2 B. Mon. 26, in a suit on a promissory note given to a clock peddler (required to have a license), it was held that the legal presumption was that he had a license; that the law does not presume a violation of its own mandates.

On what constitutes the *practice of dentistry* under the dental law, so as to prevent a subsequent conviction on a separate charge, for practising prior to the indictment on which the accused was previously convicted, see Wilson *v.* Commonwealth (Ct. of Ap., Ky., 1904), 82 S. W. R., 427, holding that a second conviction could not be had for any practice prior to the first indictment, that the *practice* denounced by the statute was a continuous course, and that one indictment covered all practice up to the date of its finding.

MAINE. (See *supra*, p. 286.)

Under a former law a Christian Scientist who had obtained a certificate of good moral character from the officers of the town where he resided previous to the rendition of service by him, could recover upon an express promise to pay for his services. There was nothing unlawful or immoral in such a contract. Wheeler *v.* Sawyer, 15 Atl. R., 67 (1888) (Supr. Jud. Ct., Me.).

(See *supra*, p. 288, n. 5.) Bibber *v.* Simpson is reported, 59 Maine, 181.

MICHIGAN. (See *supra*, p. 305.)

The following changes are made necessary by Act 1905, No. 56: Insert on page 312, top line, after *State*, the following: "Without being the lawful possessor of a certificate of registration issued under and pursuant to Act No. 237, 1899, or its amendments or."

Strike out from line 2 of page 312 the words "or violating its provisions."

Insert on page 312, line 4, after s. 7, the following: And Act 1905, No. 207.

On page 312, line 5, substitute for $100, $200.

On page 312, line 6, substitute for ninety days, six months.

Insert on page 311, before "STANDARD OF MEDICAL EDUCATION," the following:

Students of medicine and surgery, attending any legally organized and reputable medical college or university, approved by the board, such students being indorsed by the board as having fulfilled the legal requirements of this State for entrance to or matriculation in recognized medical colleges, and who shall have completed in accordance with the board's adopted and published minimum standard of medical education, in such approved medical college or university through attendance and examination and not prior to the termination of the second year in such institution, such proportion of the whole course of subjects provided for under section 3, subd. 1, Act 191, Laws 1903 amdg. Act 237, Laws 1899, as shall be prescribed by said board, shall have the right to an examination by said board, called the primary examination, upon all such prescribed subjects as shall have been completed by said students, to be held at such times and places as designated by the board, and to receive from the board a certificate, showing the fact of such primary examination, with the credits received thereon, in the several subjects, and such credits shall at the election of the student be included in and shall form a part of the final examination provided for under said sec. 3, subd. 1, provided that said credits shall be included in and form a part of the final examination only if such credits be presented to the board within three years from the primary examination, and provided that subsequent to graduation from a recognized medical college in said final examination for a certificate of registration, the applicant shall, if presenting said credits to the board, be examined only in those subjects prescribed in sec. 3, subd. 1, and which have not been prescribed and listed by the board for primary examination (Act 1905, No. 56, sec. 1).

Any applicant applying to the board for the primary examination shall, with the application, present to the board satisfactory proof that the applicant is a bona fide and legally registered student of medicine and surgery in a legally organized and reputable medical college or university, recognized as such by the board and indorsed by the board as having fulfilled the legal requirements of matriculation in this State, and that the appli-

cant has completed by attendance and examination, and not prior to the termination of the second year in such recognized college or university, such a proportion of the whole course of subjects provided for under the general laws of the State as has been prescribed by the board. The applicant shall at the same time pay to the board, for the primary examination, such uniform fee during each calendar year as shall be determined by the board as necessary to cover the expense incurred by such additional examinations, not to exceed $15 per applicant; but payment of the primary examination fee does not relieve from the payment of the fee provided in sec. 3, subd. first (a) (Act 1905, No. 56, sec. 2).

On page 313 under title "FEES," insert: To the board, for primary examination a uniform fee, fixed by the board, not to exceed $15 (Act 1905, No. 56, sec. 2).

A complaint is not defective because it is general in its terms, is stated in the language of the statute and does not specify the particular acts or means by which the defendant practised medicine. White *v.* Lapeer Circuit Judge (Supr. Ct. of Mich., 1903), 94 N. W. Rep., 601, citing People *v.* Phippin, 70 Mich., 6.

MISSISSIPPI. (See *supra*, p. 328.)

(See p. 330.) Where the statute describes the offence, the indictment should follow its language and expressly charge the described offense. Dee *v.* State, 68 Miss., 601. Where the indictment fails to charge that the prescription alleged was for the cure or relief of an ailment or disease of mind or body, or the cure or relief of a bodily injury or deformity, it is fatally defective (*ib.*).

MISSOURI. (See *supra*, p. 331.)

(See *supra*, p. 334.) When the subject matter of a negative averment lies peculiarly within the knowledge of the other party the averment is taken as true unless disproved by that party. State *v.* Hathaway, 115 Mo., 36.

(See *supra*, 332.) The jurisdiction conferred upon the State board of health (by sec. 6,878 R. S., 1889) does not trench upon the jurisdiction conferred by the State constitution upon the judiciary (*ib.*). The power exercised by the legislature in passing this law is part of the police power (*ib*). The legislature has the power to provide for a board of experts to conduct the examinations to ascertain whether those whom it shall permit to practise medicine come to the standard the State prescribes (*ib.*). It is not a grant of judicial power to provide that the board shall inquire into the moral character of applicants (*ib.*).

(See *supra*, p. 331.) It is not an unconstitutional discrimination to except

physicians who have been practising five years in the State; they constitute a separate class and the legislature may properly except them (*ib.*).

(See *supra*, p. 335.) The duties of the board in refusing or revoking certificates to persons guilty of unprofessional or dishonorable conduct are *quasi*-judicial; the determination calls for the exercise of judgment and sound discretion; the board must hear evidence and pronounce a conclusion. A mandamus will not lie to review these acts; it may compel action, but it will not control the conclusion. If the board, however, should exercise its powers with manifest injustice, the courts may and will control the abuse of authority by mandamus. State ex rel. Hathaway *v.* State Board of Health, 103 Mo., 22.

(See *supra*, p. 335.) As the legislature has not defined *unprofessional or dishonorable conduct*, those words must be understood to mean such conduct as would in common judgment be deemed unprofessional or dishonorable (*ib.*). The board has a broad field for the exercise of judgment and discretion, within which its finding is conclusive; but it has no right to prescribe a code of professional ethics and declare a breach unprofessional or dishonorable, nor has it the right or power to deny to physicians the right to advertise their profession in the public press. It is within the power of the board to determine whether such advertisements tend to mislead or deceive the public and therefore constitute unprofessional and dishonorable conduct; if the physician, in his advertisements, throws out inducements to patients to submit to treatment, then the matter is within the exclusive jurisdiction of the board (*ib.*). The burden is on the relator to show that the ruling of the board is manifestly unjust (*ib.*). A person who practises without a certificate, in knowing defiance of law, is not entitled to one (*ib.*). The performance of the board's duties will not be hampered by mandamus until a case of manifest injustice is shown (*ib.*).

Where a physician renders services on request, and there are no circumstances tending to prove that they were intended to be gratuitous, the legal presumption arises that they were to be paid for. Voerster *v.* Kunkel, 86 Mo. Ap., 194. This presumption is reversed where the person attended is a parent of the physician or one standing *in loco parentis* (*ib.*).

It is not necessary that a person shall be a practising physician in order to be liable for his own or his employee's negligence in treating human maladies. Longan *v.* Weltmer, 180 Mo., 322. In this case the court indicates that *magnetic healing* is not one of the recognized professions. It quotes the following from Nelson *v.* Harrington, 72 Wis., 591. . . "One who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition. If these move him so imperfectly or inaccurately that, although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences." Physicians who knew nothing about the practice of *magnetic healing* were nevertheless competent to testify whether the treatment applied to the patient was proper in her condition. That a person claims or pretends to possess certain powers of healing peculiar to

himself is no reason why other persons who do not claim such powers may not be from education and practice competent to judge whether the treatment was negligently or carelessly done. Longan *v.* Weltmer, 180 Mo., 322 *cf.* Spead *v.* Tomlinson, *infra*, p. 696.

NEBRASKA. (See *supra*, p. 350.)

The Act of 1905 referred to on p. 360 is ch. 95.

A corporation is not such a person as can be licensed to practise medicine. State Electro-Medical Institute *v.* State, 103 N. W. Rep., 1,078 (Supr. Ct. Neb., June 8th, 1905). And a corporation can not practise medicine as defined in this act. The qualification of a medical practitioner is personal to himself; but neither making contracts nor collecting compensation is practising medicine within the meaning of this act. A corporation which employs licensed physicians and makes contracts to furnish their services and collects compensation therefor is not practising medicine, and cannot be restrained on that account from doing business (*ib.*).

A contract for medical services made by a corporation, to be performed by a licensed physician, is not illegal nor void; it does not violate the statute. nor is it against public policy. State Electro-Medical Institute *v.* Platner, 103 N. W. Rep., 1,079 (Supr. Ct. Neb., June 8th, 1905). It is the one who actually performs the surgical operation or administers the remedy that must be qualified and licensed under the statute (*ib.*). The law does not prohibit an action by the assignee of a physician's claim for compensation (*ob. dic.*) (*ib.*). This statute does not prevent licensed practitioners from forming a corporation and making contracts with their patients in the corporate name; and it is not different if one or more incorporators should not be a licensed physician (*ib.*). A hospital does not practise medicine (*ob. dic.*) (*ib.*). It is not for a court, on the ground of public policy, but for the legislature, if it sees fit, to regulate and control the conduct of corporations which contract to furnish the services of licensed physicians (*ib.*).

NEVADA. (See *supra*, p. 362.)

UNPROFESSIONAL CONDUCT.—(See *supra*, p. 366.) Unprofessional conduct means: (1) The procuring or aiding or abetting in procuring a criminal abortion; (2) the obtaining of any fee on the assurance that a manifestly incurable disease can be permanently cured; (3) the wilfully betraying a professional secret; (4) all advertising of medical business in which grossly improbable statements are made; (5) all advertising of any medicines or of any means whereby the monthly periods of women can be regulated or the menses reëstablished if suppressed; (6) conviction of any offence involving moral turpitude; (7) habitual intemperance (Act 1905, c. 63, s. 12).

New Hampshire. (See *supra*, p. 368.)

Christian Science.—The legal aspects of Christian Science and the legal duties of Christian Scientists who assume to be healers are treated at great length in the briefs in Spead *v.* Tomlinson (N. H., 1904), 68 L. R. A., 432 (adv. sheets August 1st, 1905).

A physician's treatment is to be tested (in a suit for malpractice) by the general doctrines of his school, and not by those of other schools. Spead *v.* Tomlinson, 68 L. R. A., 432 (N. H., 1904). 59 Atl. R. 376.

A Christian Scientist, known to his patient to be such at the time of his employment, is not liable for malpractice, to his patient, a person of mature years, because his method (if conforming with the standard of care, skill, and knowledge of the ordinary Christian Scientist) is so contrary to common sense and reason as to be negligent; it might be otherwise if his patient were an infant, *non compos mentis*, or had not assented to treatment by the Christian-Science method. Spead *v.* Tomlinson (N. H., 1904), 68 L. R. A., 432, 59 Atl. R. 376.

On a motion for reargument, the court stated that there was no evidence that plaintiff employed defendant to advise her as to whether or not Christian Science could be successfully employed in the treatment of appendicitis. It held that evidence that he stated that he could and would cure her (though he failed, and his methods were condemned by the medical profession) was not sufficient to sustain the action because he was to be judged by the methods of Christian Scientists, and there was no evidence that it was not one of their methods to encourage their patients by such assurances. (*ib.*)

Though it has been held that where the medical profession recognizes but one course of treatment, the adoption of any other course might be evidence of a want of ordinary knowledge, care, and skill (see cases cited in Spead *v.* Tomlinson, 68 L. R. A., 432, N. H., 1904), still a course, condemned by the medical profession, but adopted by a Christian Scientist, is not evidence of negligence amounting to malpractice, where there is no evidence that the course adopted is contrary to Christian Science practice (*ib.*).

The court reasoned that a person knowingly employing a Christian Scientist to treat *appendicitis* by Christian-Science methods could no more complain against the unsuccessful healer who used those methods than one who knowingly employed a common matmaker to weave a fine carpet, or a farrier to cure a disease of the eye (who should use remedies prescribed in such cases for horses), saying, "he must impute the bad workmanship to his own folly" (quoted from Story's Bailments, s. 435).

On a motion for reargument in Spead *v.* Tomlinson, the court held that treatment of appendicitis by prayer alone, or by Christian-Science methods (though for pay), is not against public policy in New Hampshire. It further said that if plaintiff's method of treatment according to Christian-Science methods was illegal, his patient could not recover damages, because in that case her knowledge of its illegality was as great as his, and she was equally a wrong-doer in submitting to such illegal treatment. And this, it said, was true, notwithstanding the defendant might have been guilty of manslaughter if his patient had died. The court distinguishes the patient's cause and

grounds of action from the State's, and indicates that the State might prosecute where the patient could not recover for malpractice.

On the motion for reargument, the court held that there could be no recovery by the patient against the healer on the ground of deceit in his statement that he could and would cure her, because though this was stated in form as a fact, it was from its nature only a strong expression of opinion, and could not be the basis of an action for deceit unless the healer knew it to be untrue; and as he could have no personal knowledge on the subject, he could not know his assurance to be untrue. The court indicated (without deciding it), that if there could be any recovery as for deceit, upon a statement of opinion, it could only be where the person did not at the time entertain the opinion; and stated that a jury could not find that the healer did not entertain the opinion, merely because they thought it was unsound or even absurd; and consequently that in this case they could not find the fraudulent intent which is necessary to sustain an action for deceit; where there was no evidence that a Christian-Science healer had any knowledge of physiology or medicine, the court would not even impute to him the ordinary general knowledge of mankind on the subject where the sworn testimony showed, without contradiction, that he believed that the methods employed by Christian Scientists were the most effectual remedy for the relief of physical pain.

But, the court said, if there had been evidence that Christian-Science treatment had never been successfully applied, or that no attempt had been made to apply it to the treatment of chronic appendicitis or that the defendant had never applied such treatment to any disease, or to that disease with success, or had never known of such a case being successfully so treated, there would then have been evidence of negligence in defendant's attempt to treat her in the way he did and in the advice he gave her, or it could have been found that he intended to deceive her, for there would then have been direct evidence that he told her as a fact what he did not know to be true; but the plaintiff could not stand merely upon the universal experience of mankind to be found by the jury from their knowledge of human affairs. It was not incumbent on defendant to prove the existence of a system of Christian Science applicable to chronic appendicitis, where the plaintiff showed by her own evidence the existence of such a system and the practice of it in all diseases by a large number of people.

New Jersey. (See *supra*, p. 375.)

State *v.* Herring, 56 Atl. R., 670, was affirmed by Court of Errors and Appeals. 60 Atl. R., 1,134 (see *supra*, p. 379).

It was stated in the New York *Times*, October 17th, 1905, that the boards of medical examiners of New York and New Jersey, as a result of a conference held the preceding day, would, after January 1st, 1906, recognize the licenses issued by each other. The Secretary of the New Jersey Board has confirmed this to the writer.

New York. (See *supra*, p. 388.)

Privileged Communications.—After the work on privileged communications had gone through the press (see *supra*, p. 97 *et seq.*), an amendment to the law of New York (in effect September 1st, 1905) (Laws 1905, c. 331, amending Code Civ. Pro., s. 834) put the following limitation upon the restriction previously established: "Unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial, or other proceeding in which the commission of such crime is a subject of inquiry." Nothing in the amendatory act of 1905 affects any action or proceedings *now* (*i.e.*, September 1st, 1905) pending (*ib.*, s. 2) (became a law April 25th, 1905).

Medical Laws.—Note: In contrast with Hawker *v.* N. Y. (p. 390 *et seq.*), see Regina *v.* Coll. of Phys. and Surg., 44 Up. Can. Q. B., 146 (1879) (*supra*, p. 640), where the injustice of such a provision depriving one convicted of felony not connected with his profession) is made the basis of a principle of construction, which excludes convictions previous to registration; also that a sentence served is equivalent to a pardon by reason of a statute to that effect.

North Carolina. (See *supra*, p. 405.)

Tax on Peddling Drugs and Medicines.—All persons, firms, corporations, or companies who shall sell or offer for sale, whether of their own manufacture or not, any medicines, nostrums, herbs, roots, or drugs of any description on the streets or public highways, or in public halls, parks, tents or private dwellings, or from any vehicle, peddler's pack, or package, shall pay a license tax of $100, which shall expire at the end of twelve months from date of issue in every county in which such business is carried on. This does not prevent any merchant or druggist from selling any patent or proprietary medicines, having a fixed place of business, nor apply to drummers selling by wholesale. It is discretionary with the board of county commissioners whether they will issue a license; and they may in their discretion exempt from such tax any poor and infirm person (Act 1905, c. 502).

Ohio. (See *supra*, p. 416.)

The practice of medicine has been so long subject to State regulation that it might be said to be not an absolute right but a privilege. If it be assumed to be an absolute right it is subject to reasonable regulations or conditions under the police power. State *v.* Marble (Supr. Ct. of Ohio, February, 1905), 73 N. E. R., 1,063. The offer of prayer for recovery and absent treatment for a fee is the practice of medicine within the act (sec. 4,403 f. as amd. April 21st, 1902). Christian-Science practice is treatment within the definition of the act. The legislature intended to bring within the definition every person who for a fee prescribes or recommends a cure, even though the cure is to come, through his intercession, from God (*ib.*). This is not against the Bill of Rights, sec. 7, guaranteeing to all men a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience, and freedom from interference with the rights of conscience. The statute does not prohibit the treatment except for a fee (*ib.*). The law is within the police power (*ib.*). The act does not discriminate unconstitutionally against a Christian Scientist, though it requires him to take an examination in subjects which he disclaims, and though osteopaths are excused from an examination in certain of the same subjects. This is a classification and discrimination which the legislature may properly make (*ib.*). If the statute is too comprehensive, the remedy is in the legislature (*ib.*). It would defeat the purpose of this legislation to let the practitioner determine what treatment he will give so as to limit the subjects of examination (*ib.*).

Pennsylvania. (See *supra*, p. 448.)

Registration (see *supra*, p. 455)—Every physician and midwife must register his or her name, address, and occupation with the local registrar of the district in which he or she resides, or may hereafter (May 1st, 1905) establish a residence (Act 1905, No. 221).

On the validity of a confessed judgment in favor of physician for treatment of *malade imaginaire* see Fishblate *v.* McCullough (C. P. No. 3, Phila. Co.), 15 Lanc. L. Rev. 382 (1898), 14 Montg. Co. Law. R. 164, where it was held valid.

(See *supra*, p. 449.) The medical council of Pennsylvania is not concluded by an affidavit of the secretary of the Maryland board that its standard is substantially the same as that of Pennsylvania; the evidence must be sufficient to satisfy the honest judgment of the members of the Pennsylvania Council. Ludwig *v.* Medical Council, 2 Dauphin Co. R. 243 (1899). A mandamus to the council was refused.

(See *supra*, p. 460.) The omission of the word *transient* or *itinerant* from the title of a law regulating physicians who open an office for *transient* business does not make the law unconstitutional. Commonwealth *v.* Lorman, 21 Pa. Co. Ct. R. 481 (Cumberland Co., 1898).

SOUTH CAROLINA. (See *supra*, p. 470.)

The Act of 1905, c. 465, amended sec. 6 by adding thereto a proviso that nothing in this act should prevent the board from admitting as eligible for examination before it, on both the junior and senior curriculum in sec. 7, any person who satisfies the board that he or she had been regularly admitted to advanced standing in some medical college or school of established reputation requiring a four-years' course of study, and had received a diploma of M.D. therefrom, and is otherwise eligible under the provisions of this act (see *supra*, p. 472, for sec. 6, to which this proviso was added).

The Act 1905, c. 465, s. 7, provides that nothing in the act shall affect the practice of osteopaths, as provided for in the Act of February 27th, *1902*. The Act of 1904, c. 292, sec. 16, repealed all acts and parts of acts inconsistent with it, and contained sec. 13, providing for permits to practise osteopathy without examination (see *supra*, p. 475). The Act of 1905, however, treats the Act of February 27th, *1902*, as still operative. There does not seem to be such law as is here referred to. The law abstracted in the text is a law of February 27th, *1904*.

LICENSED HAWKERS, ETC., OF MEDICINE.—By Act 1902, c. 599, provision is made for a license to hawkers and peddlers from place to place, of medicines, drugs, or compounds to be used as a curative; the license fee is $100 per annum in each county; but every package or bottle must have on it in the English language the formula of the contents, approved by a regularly licensed practising physician of the State lithographed or printed on each package or bottle. Those on the confederate pension roll are exempt from the license fee.

SOUTH DAKOTA. (See *supra*, p. 476.)

OSTEOPATHY — OFFENCE — PENALTY. — The imprisonment provided in sec. 266, as amended Act 1905, c. 143, is imprisonment in the county jail not less than thirty days nor more than six months; or both such fine and imprisonment in the discretion of the court (see p. 482 *supra*).

Any person who uses any of the terms or letters "osteopath," "osteopathist," "osteopathy," "doctor of osteopathy," "diplomat

in osteopathy," or "D. O.," or any other titles or letters under such circumstances as to induce the belief that the person who uses such terms is engaged in the practice of osteopathy without having complied with the provisions of this act (Rev. Pol. Code, S. D., 1903), is guilty of a misdemeanor punishable as above provided in sec. 266 as amd. (Act 1905, c. 143, amdg. sec. 266).

OSTEOPATHY—PROSECUTION.—It is the duty of the States' attorney in the county in which such person resides or practises, when notified of such violation, to take charge of and conduct the prosecution under this act (*ib.*).

In State *v.* Yegge, 103 N. W., 17 (Supr. Ct. S. D., April 5th, 1905), a graduate opthalmologist was held to be practising medicine within the definition of this act (see *supra*, p. 480). It was competent for the legislature to define what evidence shall be deemed sufficient to constitute a practitioner within the act (*ib.*).

TENNESSEE. (See *supra*, p. 483.)

Act 1901, c. 78, s. 1 (see *supra*, p. 483) was amended by Act 1905, c. 111, by adding the following: Provided further, that the provisions of this act shall not apply to any graduate of a reputable medical college who has been a practitioner of medicine or surgery for more than ten years in the State of Tennessee at the date of the passage of this act.

OSTEOPATHY (see *supra*, pp. 487, 488)—STATE BOARD OF OSTEOPATHIC REGISTRATION AND EXAMINATION.—This board consists of five persons appointed by the Governor. The board may formulate rules to govern its actions; it is required to meet in Nashville in July each year, and at such other times and places as a majority appoint. Three members are a quorum. No certificate to practise osteopathy shall be granted on an affirmative vote of less than three. The board is required to keep a register of all applicants for certificates, giving name and location of the institution granting the applicant the degree of doctor of or diplomate in osteopathy, the date of his diploma, and also whether the applicant was rejected or a certificate granted. The books and register of the board are *prima facie* evidence of all matters recorded therein (Act 1905, c. 255, s. 1).

OSTEOPATHY — QUALIFICATION. — Before engaging in the practice of osteopathy, a person shall, on payment of $15, make

application for a certificate to the secretary of the board, on a form to be prescribed by the board, giving his name, age (not less than twenty-one years), residence, name of school of osteopathy from which he or she was graduated (which shall have been in good repute as such at the time of issuance of the diploma as determined by the board), the date of diploma, evidence that it was granted on personal attendance and completion of the course of study of not less than four terms of not less than five months each, and such other information as the board may require, and sufficient evidence that the applicant is of good moral character (*ib.*, s. 2).

Osteopathy—Examination.—The board shall subject all applicants to an examination in anatomy, physiology, symptomatology, physiological chemistry and toxicology, osteopathic pathology, diagnosis, hygiene, obstetrics, and gynecology, minor surgery, and such other subjects as the board may require (*ib.*).

Osteopathy—Former Practitioners.—The Act of 1905, c. 255, provided for the issuance of certificates without examination within ninety days from its date (approved April 11th, 1905) of those in active practice in Tennessee, at the passage of the act, having a diploma from a legally chartered school or college of osteopathy in good standing as such at the time of issuing such diploma as determined by the board (*ib.*, s. 2).

Osteopathy—Admission without Examination.—The board may in its discretion dispense with an examination in the case of an osteopathic physician duly authorized to practise osteopathy in any other State or Territory of the United States, or in the District of Columbia, who shall present a certificate of registration or examination by the legally constituted board of such State or District, accorded only to applicants of equal grade with those required in Tennessee (*ib.*).

Osteopathy—After June, 1907.—After June, 1907, no holder of a diploma issued after said date shall be admitted to an examination, nor a certificate to practise osteopathy be otherwise granted to such person, unless said person shall have graduated after personal attendance from an osteopathic school of good repute, as such, determined by the board, wherein the course of study shall consist of at least three years of nine months each (*ib.*).

Osteopathic Physicians shall observe and be subject to all

State and municipal regulations relating to the control of contagious diseases, reporting and certifying of births and deaths, and all matters pertaining to public health; and such reports shall be accepted by the officer or department to whom made (*ib.*, s. 4).

OSTEOPATHY—RECORDING.—Every person holding a certificate from the board shall have it recorded in the office of the county clerk of the county in which he expects to practise. Until so filed for record, its holder shall exercise none of the rights or privileges therein (*ib.*, s. 5).

OSTEOPATHY—OFFENCE—PENALTY.—To practise, or pretend, or attempt to practise, or use the science or system of osteopathy in treating diseases of the human body, or to buy, sell, or fraudulently obtain any diploma, license, record, or registration to practise osteopathy, illegally obtained, or signed or issued unlawfully or under fraudulent representation, or to use any of the forms, or letters, osteopathy, osteopath, osteopathist, diplomate in osteopathy, D.O., osteopathic physician, doctor of osteopathy, or any other title or letters, either alone or with other qualifying words or phrases, under such circumstances as to induce the belief that the person who uses such term is engaged in the practice of osteopathy, without having complied with the provisions of this act, is a misdemeanor, punishable with a fine of from $25 to $100 for each offence (*ib.*, s. 6).

OSTEOPATHY—FEES.—In advance to the treasurer of the board (*ib.*, s. 3), with application for certificate, $15 (*ib.*, s. 2). To the clerk, for recording certificate, $1 (*ib.*, s. 5).

OSTEOPATHY—REPEALER (see *supra*, p. 488).—The Act of 1905, c. 255, repeals the Act of 1899 (designated in the repealing act as c. 364, the correct number being 394 (*ib.*, s. 7).

TEXAS. (See *supra*, p. 488.)

MALPRACTICE—SUSPENSION—REVOCATION.—Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they use *the* medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall by any untrue or fraudulent statement or representation, made as such physician or person to a patient or

other person being treated by such physician or person, procure and withhold or cause to be withheld from another any money, negotiable note, or thing of value, may be suspended in his right to practise medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form as is provided for revoking or suspending license of attorneys at law (Act 1905, c. 150).

The act is constitutional under the Texas constitution. Stone *v.* State, 86 S. W. R., 1,029 (Ct. Cr. App., 1905). The legislature intended by Art. 3,778 to give a preference by law to allopaths in the organization of the board, but not in prescribing qualifications of practitioners (Art. 3,784). Mere favoritism to the allopathic school in the organization of the board does not make the act unconstitutional, in view of the fact that all persons must be examined upon certain specified subjects before obtaining licenses (*ib.*), citing *ex parte* Gerino, 77 Pac. R., 166, 66 L. R. A., 249, Cal.).

It would not be necessary for an applicant to be examined, who filed his diploma, with the satisfactory evidence required by the statute, and had the certificate issued by the board recorded (*ib.*) (*ob. dic.*). The certificate is a *sine qua non* (*ib.*). The arbitrary refusal of the board to grant it is no defense to a prosecution for practising without it (*ib.*).

A physician who maintains four offices at different places in the State, keeping an assistant at each place, but having his headquarters at one of the places, and who practises nowhere except at his said offices, is not a travelling physician contemplated by Art. 5,049, Sayles Rev. Civ. St., 1897, Art. 5,049. Adams *v.* State, 78 S. W R., 935 (Tex. Ct. Cr. App., 1904), citing Hairston *v.* State, 36 Tex. Cr. R., 470; 37 S. W. R., 858: Broiles *v.* State, 68 S. W. R., 685.

UTAH. (See *supra*, p. 498.)

(See *supra*, p. 499)—REGISTER.—Every physician and midwife is required to register his or her name, address, and occupation with the local registrar (of vital statistics) of the district in which he or she resides or may establish a residence (Act 1905, c. 120, s. 20).

WISCONSIN. (See *supra*, p. 527.)

REFUSAL—REVOCATION.—It is the duty of the board to refuse to license or grant a certificate of registration to any person guilty of immoral, dishonorable, or unprofessional conduct. The circuit courts are vested with jurisdiction and power to revoke and annul any license or certificate of registration which

has been heretofore (June 22d, 1905, date of publication) or which may hereafter be issued to any person to practise medicine or surgery or osteopathy, who is guilty of immoral, dishonorable, or unprofessional conduct after the passage of this act (approved June 19th, 1905, published June 23d, 1905), or who has procured such license or certificate by fraud or perjury, or where the same was obtained through error. Upon a verified complaint in writing, by any person, to the district attorney of any county charging any holder of such license or certificate with having, in said county, been guilty of any immoral, dishonorable, or unprofessional conduct as defined in this act, or with having procured such certificate or license by fraud or perjury or through error, said district attorney shall commence and prosecute an action in the circuit court of said county against the person so complained against, to revoke and annul such license or certificate. The action is prosecuted as a civil action in the name of the State against the accused. The rules of pleading, evidence, and practice in civil actions in the circuit court are applicable. Either party may appeal to the Supreme Court; either party may demand a jury trial. The defendant has the right to be represented by counsel, and the court may appoint counsel to assist in the prosecution. If the court or jury find for the plaintiff, judgment shall be rendered revoking and annulling such license and certificate. The clerk is required to cause a certified copy of such judgment to be sent to the secretary of the board to be filed for record in his office (Act 1905, c. 422, s. 1).

Penalty.—A person whose license or certificate has been revoked under this act, who shall thereafter practise or offer or attempt to practise medicine, surgery, or osteopathy in this State, shall be punished as provided in ch. 426, laws 1903 (*supra*, p. 533) (*ib.*).

Testimony.—No person shall be excused or privileged from testifying fully under oath, or producing evidence, documentary or otherwise, in any action, proceeding, or examination brought under the provisions of this act; but no person shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which such person may so testify or produce evidence, documentary or otherwise, except for perjury committed in giving such testimony (*ib.*).

WILFUL AND MALICIOUS COMPLAINT.—If the court before which the trial is had shall determine that the complaint to the district attorney was wilful and malicious and without probable cause, it shall enter judgment against the person making the complaint for the costs of the action, and payment may be enforced by execution against his body as in tort actions (*ib.*).

DEFINITION.—The words *immoral, dishonorable, or unprofessional conduct* mean: (1) procuring, aiding, or abetting a criminal abortion; (2) advertising, either in his own name or in the name of another person, firm, association, or corporation, in any newspaper, pamphlet, or other written or printed paper or document, in an obscene manner, or in a manner derogatory to good morals, the curing of venereal diseases, the restoration of *lost manhood*, or the advertising of any medicine or any means whereby the monthly periods of women can be regulated, or the menses reëstablished, if suppressed, or being employed by or in the service of any person, firm, association, or corporation so advertising; (3) the obtaining of any fee on the assurance that a manifestly incurable disease can be permanently cured; (4) wilfully betraying a professional secret; (5) indulging in the drug habit; (6) conviction of any offense involving moral turpitude (*ib.*).

UNITED KINGDOM OF GREAT BRITIAN AND IRELAND.

(See *supra*, p. 542.)

BRITISH POSSESSION.—For the purposes of the Medical Act, 1886, where any part of a British possession is under a central and also under a local legislature, his Majesty may, if he thinks fit, by order in council, declare that the part which is under the local legislature shall be deemed a separate British possession.

(Act of August 11th, 1905, ch. 14, amending 49 and 50 Vict., c. 48, s. 27, and styled "The Medical Act [1886] Amendment Act, 1905").

(See *supra*, p. 558.) On the use of a registered predecessor's name on the sign of an unregistered dentist, in connection with the name of the latter, see Brown *v.* Whitlock, 67 J. P., 451 (1903), where the use in the particular case was held not unlawful.

On use of title "Institute" by a dentist see Panhaus *v.* Brown, 68 J. P., 435 (1904).

ALBERTA.

The Province of Alberta was constituted from a part of the Northwest Territories and inaugurated late in 1905 after this article was in press. (Canada Laws, 1905, c. 3.) See Northwest Territories, *supra*, p. 619. The Acting Deputy Attorney General of the Province states that there has been no change in the medical law since the Northwest Terrtories ordinance of 1903.

BRITISH COLUMBIA. (See p. 579.)

The object of the Imperial Medical Act of 1858 is stated in its preamble, to enable persons desiring medical aid to distinguish qualified from unqualified practitioners. The same object is expressed in the preamble of the first British Columbia statute, 1867. All of the amendatory Imperial and British Columbia acts should be construed with reference to this object. Metherell *v.* Medical Council, 2 Br. Col., 186 (1892).

One whose rights accrued under the Imperial statute of 1868 was not affected by the subsequent modification of 1886 (*ib.*). History of the British acts, respecting practice in British dependencies (*ib.*). History of British Columbia legislation on the same subject (*ib.*). The Imperial Act is controlling in the province (*ib.*). The Council should make rules to carry out the provisions of the Imperial act operative in the province; if it does not, a mandamus should issue to one entitled to registration in British Columbia under the Imperial act (*ib.*); the right of a Canadian practitioner to registration in England, and the meaning of *British Possession* are discussed *obiter* in this case.

CANADA. (See *supra*, p. 589.)

See p. 706, *supra*, British Act 1905, c. 14.

HAWAII. (See pp. 228 and 688.)

By Act 48 of 1905, sec. 1,068 of the revised laws was amended to read substantially as follows:

QUALIFICATION—OSTEOPATHY.—No person shall practise medicine or surgery in the Territory either gratuitously or for pay, or shall offer to so practise, or shall advertise or announce himself, either publicly or privately, as prepared or qualified to so practise without having first obtained from the treasurer, under the seal of his department, a license [in the form prescribed] which shall only be granted on the written recommen-

dation of the board of health, *provided* that licenses to practise osteopathy may be granted to graduates holding diplomas from any legally chartered and regularly conducted school or college of osteopathy; and further *provided* that a certificate to practise osteopathy has first been obtained from the State board of osteopathic examiners of California until there is an osteopathic board of examiners appointed for Hawaii; and *provided* further that the practice of medicine as contemplated and set forth in this act shall not be construed to exclude the use of any method or means or any agent, either tangible or intangible, by any person licensed to practise osteopathy for the treatment of disease in the human subject; *provided* that no person so licensed to practise osteopathy shall, by reason thereof, be authorized to administer drugs or medicines.

Any person applying for a license to practise osteopathy shall first file with the treasurer a certified copy of such diploma and satisfactory evidence that the applicant is a fit and proper person to be so licensed to practise osteopathy, and file with the president of the board of health a certificate from the board of osteopathic examiners of California, certifying that the applicant has passed the required examination and is entitled to practise osteopathy in that State (Law 1905, No. 48, § 1).

FEE.—No license shall be granted under this section unless the applicant pay an annual fee of $10 (*ib.*).

SYNOPSIS OF THE SUBJECTS

TREATED IN THE NOTES TO THE LAWS REGULATING THE PRACTICE OF MEDICINE.

[*The subjects treated in the statutes are indicated in the Synopsis of the Laws by their titles*, e.g., BOARD OF MEDICAL EXAMINERS, QUALIFICATIONS, *etc.*]

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FORENSIC MEDICINE.

THANATOLOGICAL.

THE

LEGAL STATUS OF THE DEAD BODY.

THE DISPOSAL AND OBLIGATION TO DISPOSE OF THE SAME; HOW AND BY WHOM IT MAY BE EXHUMED OR REMOVED; AUTOPSIES, BY WHOM ORDERED; THE RIGHTS OF RELATIVES AND ACCUSED PERSONS;

INCLUDING

AN APPENDIX CONTAINING A SYNOPSIS OF THE STATUTES OF THE DIFFERENT STATES AND TERRITORIES OF THE UNITED STATES CONCERNING SAME.

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LEGAL STATUS OF THE DEAD BODY.

Disposal and Obligations to Dispose of the Same.—There is no right of property, in the ordinary sense of the word, in a dead human body; but for the health and protection of society it is a rule of the common law, which has been confirmed by statutes in all civilized states and countries, that public duties are imposed upon public officers, and private duties upon the husband or wife and the next of kin of the deceased, to protect the body of the dead from violation and see that it is properly interred, and to protect it after interment. A parent is bound to provide Christian burial for a deceased child, if he has the means, but if he has not the means, though the body remains unburied so long as to become a nuisance, he is not indictable for the nuisance, even if he could obtain money for the burial expenses by borrowing it of the poor-law authorities of the parish, for he is not bound to incur a debt (Reg. *v.* Vann, 2 Div. C. C., 325; 15 Jur., 1,090). On the other hand it has been held in England that every householder in whose house a dead body lies is bound by the common law, if he has the means to do so, to inter the body decently, and this principle applies where a person dies in the house of a parish or a union (Reg. *v.* Stewart, 12 A. & D., 1,272). And the expense may be paid out of the effects of the deceased (Tugwell *v.* Hayman, 3 Camp., 298, and note).

In Pierce *v.* The Proprietors Swan Point Cemetery, 10 R. I., 227, s. c., 14 Am. Rep., 667, the Court said: "That there is no right of property in a dead body, using this word in its ordinary sense, may be well admitted, yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one toward the dead; a duty, and we may also say a right, to protect from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any

system of law not to provide a remedy in such a case; . . . but the person having charge of it cannot be considered as the owner of it in any sense whatever, he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it." See also Wynkoop *v.* Wynkoop, 42 Pa. St., 293; 4 Albany Law Jour., 56; Snyder *v.* Snyder, 60 How. Prac., 368; Weld *v.* Walker, 130 Mass., 422; Guthrie *v.* Weaver, 1 Mo. Apps., 136; Neighbors *v.* Neighbors, 65 S. W. 607, s.c., 23 Ky. L. Rep., 1,433; Buchanan *v.* Buchanan, 28 Misc. (N. Y.), 261; Johnson *v.* Marinus, 18 Abb. N. C., 72, and note.[1]

The law casts the duty of burial of the wife upon the husband, and of the husband upon the wife. In Secord *v.* Secord (cited in note 1 above), the Court said: "There are cogent reasons connected with public policy and the peace of families, where in the absence of testamentary disposition the possession of a corpse and the right to determine its burial should follow the administration of the estate." Inasmuch as the husband has the first right to administer upon the estate of the wife, and the wife upon the estate of the husband, the law imposes the correlative duty of burial upon the person having such right; and so it has been held that the husband is liable for the necessary expense of the decent interment of his wife from whom he has been separated, whether the party incurring the expense is an undertaker or mere volunteer.[2]

But if the deceased dies intestate, leaving no husband or wife, the duty of burial is cast upon the next of kin, in the order of right to administration.[3]

Where the deceased leaves a will appointing executors, the executors have a right to the possession of the body, and the duty of burial is imposed upon them, but it has been doubted

[1] A valuable note is appended to this last case, citing the law literature of burial-grounds, burials, etc., and also giving in full the opinion of the Special Term of the New York Supreme Court, in the case of Secord *v.* Secord, not elsewhere reported. And see also The Law of Burial, 4 Bradf., 503 (Matter of Beekman St.).

[2] Ambrose *v.* Kerreson, 10 C. B., 776; Bradshaw *v.* Beard, 12 Com. B., n. s., 344; Johnson *v.* Marinus, 18 Abb. N. C., 72; Hewitt *v.* Bronson, 5 Daly, 1; Cunningham *v.* Reardon, 98 Mass., 538. See also Gleason *v.* Warner, 78 Minn., 405, where it is held further that when the husband "neglects to discharge the duty of burying his dead wife he is liable to one who provides for her necessary and reasonable burial."

[3] Secord *v.* Secord, *supra;* Foley *v.* Phelps, 1 App. Div. (N. Y.), 551; Wynkoop *v.* Wynkoop, 42 Pa. St., 293; Bogert *v.* Indianapolis, 13 Ind., 135; Snyder *v.* Snyder, 60 How. Pr., 368; Law of Burial, 4 Bradf., 503.

whether at common law a direction by will concerning the disposal of the body could be enforced, and therefore the right to make such direction has been conferred by statute in several States.[1]

And where a widow ordered the funeral of her husband, it was held that she was liable for the expense, although she was an infant at the time, the Court holding that the expense fell under the head of necessaries, for which infants' estates are liable.[2]

Generally, the estate of a decedent should be charged with the expenses of burial.[3]

Such acts as casting a dead human body into a river without the rites of sepulture (Kanavan's Case, 1 Me., 226); stealing a corpse (2 East, P.C., 652) or stealing for dissection a dead body of one executed when the death sentence did not direct dissection (Rex *v.* Cundick, D. & R., n. p., 13), were indictable offences at common law.[4]

In the works of the early dramatists, and by some writers of fiction, it has been stated or implied that the body of a deceased person could be seized and detained to compel the payment of his debts. This was never the law. In Jones *v.* Ashburnham, 4 East, 460, it was held that to seize a dead body on pretence of arresting for debt would be *contra bonos mores*, and an extortion on the relatives, and that case distinctly overrules any authority to be derived from the case of Quick *v.* Coppleton, 1 Vent., 161, to the effect that forbearance to seize or hold a body upon such a pretence would afford any consideration for a promise to pay a debt. So also where a jailer refused to give up a body of a person who had died while a prisoner in execution in his custody, to the executors of the deceased, unless they would satisfy

[1] In New York State, section 305 of the Penal Code provides: "A person has the right to direct the manner in which his body shall be disposed of after his death; and also to direct the manner in which any part of his body, which had become separated therefrom during his lifetime, shall be disposed of; and the provisions of this chapter do not apply to any case where a person has given directions for the disposal of his body or any part thereof inconsistent with those provisions." See also Patterson *v.* Patterson, 59 N. Y., 583; Williams *v.* Williams, Law Rpts., 20 Ch. D., 659; 2 Wms. on Exrs., p. 968; Secord *v.* Secord, *supra*.

[2] Chappel *v.* Cooper, 13 M. & W., 252.

[3] Patterson *v.* Patterson (*supra*); Patterson *v.* Buchanan, 40 App. Div. (N. Y.), 493.

[4] Bishop Crim. Law, sec. 506; see also Roscoe's Cr. Ev., 445, 446; Stephens' Dig. Crim. L., sec. 292; Reg. *v.* Clark, 15 Cox C. C., 171.

certain claims against the deceased due the jailer, the Court issued a peremptory mandamus in the first instance, commanding that the body should be delivered up to the executors (Reg. *v.* Fox, 2 Q. B., 247). And in R. *v.* Scott, 2 Q. B., 248, it was said that a jailer who should attempt to do so would be guilty of misconduct in his public character, for which he would be liable to prosecution.[1]

How and by Whom the Dead Human Body may be Removed or Exhumed.—Where the right of burial has been exercised, and the body interred in its final resting-place, no person has any right to interfere with it without the consent of the owner of the grave, or of the properly constituted public authorities. In Foster *v.* Dodd, 8 D. & E., 842–854, it was held that a dead body belongs to no one, and is, therefore, under the protection of the public. If it lies in consecrated ground, ecclesiastical authorities will interpose for its protection; but whether in ground consecrated or unconsecrated, indignities offered to the remains, or the act of indecently disinterring them, are the ground of an indictment.[2]

Even the purchaser of land upon which is located a burial-ground may be enjoined from removing bodies therefrom, if he attempts to do so against the wishes of the relatives or next of kin of the deceased. Every interment is the concession of a privilege which cannot afterward be repudiated, and the purchaser's title to the ground is fettered with the right of burial.[3]

On the other hand, the right of the municipal or State authorities to remove dead bodies from cemeteries with the consent of the owner of the burial lot or in the execution of the right of eminent domain, is well settled.[4]

After the right of burial has once been exercised by the person charged with the duty of burial, or where such person has

[1] Reg. *v.* Scott, 2 Q. B., 248. Some of the United States have enacted statutes declaring it to be a misdemeanor to attach or seize under execution a dead body. See synopsis at end of this article.

[2] So in Meagher *v.* Driscoll, 96 Am. Dec., 759, it was held that a dead body is not the subject of property, and after burial it becomes a part of the ground to which it has been committed: "Earth to earth, ashes to ashes, dust to dust."

[3] 1st Pres. Ch. *v.* 2d Pres. Ch., 2 Brewster, 372; and see also Pierce *v.* Proprietors Swan Point Cem., *supra.*

[4] Craig. *v.* 1st Pres. Ch., 88 Pa. St., 42; Charleston *v.* Wentworth Cem., 4 Strob. (S. Car.), 306; Coates *v.* New York City, 7 Cow., 585; Hamilton *v.* New Albany, 30 Ind., 482; Paige *v.* Symonds, 63 N. H., 17.

consented to the burial by another person, no right to the corpse remains except to protect it from unlawful interference.[1]

On the other hand, where a husband did not freely consent to the burial of his wife in a lot owned by another person, it wa held that a court of equity might permit him, after such burial, to remove her body, coffin, and tombstones to his own lot, and restrain any person from interfering with such removal.[2]

In Rhodes *v.* Brandt, 21 Hun (N. Y.), 1, the defendant brought an action against one Beelard to recover for services rendered by him, as a physician, in treating a child of Beelard's for a fracture of the thigh-bone, in which action Beelard set up malpractice on the part of the defendant as a defence. During the pendency of the action the child died and was buried. Subsequently Beelard, the father, acting under the advice of his counsel, directed and allowed the plaintiff, a physician, to cause the body of the child to be exhumed, and a portion of the thigh-bone to be removed, in order that it might be used in evidence on the trial of the question of malpractice. After the bone was removed, the body was returned to the grave. The defendant thereupon caused the plaintiff to be arrested for unlawfully removing the body from the grave contrary to the provisions of the statute, and the plaintiff sued the defendant for malicious prosecution. The Court held that the plaintiff had not removed the body from the grave "for the purpose of sale or dissection or from mere wantonness," as these terms were used in the statute (3 R. S., 6th ed., 965), for violation of which he had been arrested, nor had he committed any offence against public decency or the spirit of the statute.[3]

Autopsies, by Whom Ordered; the Rights of Relatives and Accused Persons.—As shown in a previous article in this volume, on

[1] Peters *v.* Peters, 43 N. J. Eq., 140; Lowry *v.* Plitt, 11 Phila., 303; Weld *v.* Walker, *supra; in re* Downs, 14 N. Y. St. Rep., 189; Morland *v.* Richardson, 22 Beav., 596; s. c., 24 *id.*, 33; Guthrie *v.* Weaver, 1 Mo. App., 136; 4 Step. Com., 371; Reg. *v.* Theiss, 10 B. & S., 298.

[2] Weld *v.* Walker, *supra;* see also Johnson *v.* Marinus, *supra.*

[3] See also Com. *v.* Slack, 19 Pick., 304; Palmer *v.* Broder, 78 Wis., 483; People *v.* Fitzgerald, 105 N. Y., 146; People *v.* Richards, 138 N. Y., 137. In this last case it was held that a tomb, although constructed in the form of an elaborate mausoleum and built above the surface of the ground, was not a "building, erection or enclosure," within the meaning of the criminal statutes defining the crime of burglary in entering a "building, erection or enclosure"; and hence that entering such a tomb and taking therefrom a dead body with its grave-clothes and cerements would not amount to the crime of burglary.

the Powers and Duties of Coroners and Medical Examiners, in cases of sudden or suspicious death, it has been the law for nearly a thousand years that an inquisition or inquest *super visum corporis* must be held by an officer known as a coroner, and that this office and its powers and duties were inherited by this country as part of the English common-law system in force at the time of the formation of the republic of the United States. When a body has been buried, and the coroner believes that an inquest is necessary, he has power to disinter the body and hold an inquest, and he may direct a post-mortem examination to be made, but after having done so he must cause the body to be reinterred. It is now well settled that in holding such an inquest, and making such an autopsy or post-mortem examination required by his official duty, the coroner has authority to employ, and it is his duty to employ, professional skill and aid, and his contract will bind the county to pay a reasonable compensation for the same.[1]

As will be seen below from a synopsis of the statutes relating to this matter, many of the States have enacted statutes defining and prescribing the duties of the coroner and other public officers in such cases. At an early period in England (see 2 and 3 Will. IV., chap. 75, sec. 7) it was enacted by the English Parliament that any executor or other person having lawful possession of the body of a deceased person, and not being an undertaker or other party entrusted with the body for the purpose only of interment, might lawfully permit the body of such deceased person to undergo an anatomical examination, unless to the knowledge of such executor or other party such person should have expressed his desire during his life in writing, or verbally in the presence of two or more witnesses during his illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife or known relative of the deceased shall require the body to be interred without such examination. By another section of this statute (sec. 10), professors of anatomy and other persons duly licensed were declared not liable to punishment for having in

[1] County of Northampton *v.* Innes, 2 Carey (Pa.), 156; Com. *v.* Hannan, 4 Barr. (Pa.), 269; Alleg. Co. *v.* Watts, 3 Barr. (Pa.), 468; Van Hovenbergh *v.* Hasbrouck, 45 Barb. (N. Y.), 197; Cosford *v.* Board Supervisors, 38 N. Y. St. Rep., 964; Co. of Alleg. *v.* Shaw, 34 Pa. St., 301; Board of Com. *v.* Jameson, 86 Ind., 154.

their possession human bodies, when having such possession according to the provisions of the act.

The matter of ordering autopsies and dissections of dead bodies, or exhuming the same for that purpose or other purposes, is of so much public importance that it has been regulated in nearly all of the United States by statutory enactments, synopses of which and of the other statutes relating to the subject-matter of this article are hereunto appended.

SYNOPSIS OF STATUTES.

Alabama.

Removal of body wantonly for dissection or sale, purchase of a body unlawfully disinterred, violating grave with intent to steal body, etc., or wantonly mutilating body, is punishable by fine or imprisonment (Code [1896], secs. 4,644, 4,649).

Coroner, or in his absence justice of the peace, to hold inquest and direct examination of body by surgeon, etc. (Code [1896], secs. 4,924 *et seq.*).

Alaska.

Wrongfully disinterring or removing a dead body is punishable by imprisonment (Penal Code, sec. 131).

Commissioners of the district court, acting as coroners, shall hold inquests and direct examination of body by physician in presence of jury, etc. (Crim. Code, secs. 364 *et seq.*).

Coroner to bury unclaimed body of stranger at public expense (Crim. Code, secs. 373, 374).

Arizona.

Mutilation, etc., of dead body is a felony (Pen. Code, sec. 253).

Removal of a part of body unlawfully is punishable (Pen. Code, sec. 254).

Duty of burying body is, if a married woman, on husband; if not a married woman, on nearest of kin who is an adult possessed of sufficient means. If deceased has no relatives, on coro-

ner holding inquest or overseers, etc., of poor (Pen. Code, sec. 255).

Refusal of one on whom duty of burial is imposed by law is punishable (Pen. Code, sec. 256).

Arrest or attachment of a dead body is a misdemeanor (Pen. Code, sec. 258).

Coroner to hold inquest and direct autopsy (Pen. Code, secs. 1,258 *et seq.*).

Person whose duty it is to bury body is entitled to custody except where coroner holds it until inquest is completed (Pen. Code, sec. 257).

Arkansas.

Bodies of persons dying in almshouse, prison, house of correction, or jail shall be surrendered to a physician for dissection, etc., unless the deceased requested to be buried or the body is claimed by relatives, or unless deceased died suddenly and unknown; and after such use for dissection it shall be decently buried (R. S. [1894], secs. 2,501, 2,502).

Removal of dead body for the purpose of dissection or stealing, or from wantonness, or receiving same knowing it to have been unlawfully disinterred, is a misdemeanor (R. S. [1894], secs. 1,923 *et seq.*).

Dead body can be transported out of county in which death occurred on permit of State board of health (R. S. [1894], sec. 520).

Coroner to hold inquest and direct autopsy, etc. (R. S. [1894], secs. 751 *et seq.*).

And may order a body to be disinterred for inquisition (R. S. [1894], sec. 777).

California.

Removal, mutilation, or disinterment of dead body without authority of law is a felony (Pen. Code, sec. 290, Polit. Code, sec. 3,027).

Removal of part of body for sale or dissection, maliciously or wantonly, is punishable (Pen. Code, sec. 291).

The duty of burial of a married woman is on husband; other than a married woman, on nearest of kin an adult with suffi-

cient means; where no relatives, on coroner who held the inquest or overseers, etc., of poor (Pen. Code, sec. 292).

Refusal to bury by person on whom duty rests by law to bury is a misdemeanor, and he is liable for treble the expenses (Pen. Code, sec. 293).

Custody of body is on him on whom duty to bury is imposed by law, except where coroner detains remains for inquest (Pen. Code, sec. 294).

Arrest or attachment of dead body for any debt or demand is a misdemeanor (Pen. Code, sec. 295).

One who disinters or exhumes a body without permit of board of health, health officer, or mayor, or transports such exhumed remains through streets of town, city, etc., except in a sealed coffin, is guilty of a misdemeanor (Laws, 1878, ch. 673).

A sheriff, coroner, or keeper of county poorhouse, public hospital, county jail, or State prison, etc., must surrender bodies of those who are to be buried at public expense, to any physician or surgeon for dissection, etc., unless deceased during his last sickness requested to be buried or body is claimed by relatives, etc., or deceased was a stranger or traveller who died suddenly (Polit. Code, sec. 3,094).

Coroner to bury body when no other person takes charge of same (Polit. Code, sec. 4,286).

Coroner to hold inquest, direct autopsy, and may exhume (Pen. Code, sec. 1,510).

Colorado.

Concealment of death of issue which if born alive would be a bastard, is punishable (Mills' Stat., sec. 1,195).

Body of criminal executed for capital offence shall be delivered to a physician or surgeon unless claimed by relative or friend (Mills' Stat., sec. 1,204).

Board of health, mayor, etc., or officer, etc., having control of any almshouse, prison, hospital, jail, etc., shall surrender bodies to be buried at public expense to any physician or surgeon for dissection, etc., unless deceased during last illness requested to be buried, or body is claimed by relatives or friends, or deceased was a stranger or traveller who died unknown (Mills' Stat., secs. 1,547, 1,548).

Poor person to be decently buried (Mills' Stat., Supp., sec. 3,391 *a*).

Coroner to hold inquest, etc., or, if none, bury it decently at expense of county (Mills' Stat., secs. 870–882).

Removal of body unlawfully for sale, dissection, etc., punishable (Mills' Stat., sec. 1,367).

Trustees of town or village or board of health of city may direct removal of dead bodies from cemetery (Mills' Stat., Supp., sec. 3,597 *a*).

Connecticut.

No body shall be buried or disinterred or removed beyond limits of any town unless a permit is obtained, and where deceased died of an infectious disease body shall be in a hermetically sealed case (Gen. Stat., secs. 1,864, 1,866, 1,867, 1,871).

Custody of remains is in husband or wife or next of kin (Gen. Stat., sec. 363).

Coroner to hold inquest, etc. (Gen. Stat., secs. 1,774 *et seq.*).

And deliver body to friends, or, if none, to town authorities for burial (Gen. Stat., sec. 1,784).

Mayor, etc., may deliver bodies of those not buried within twenty-four hours after death to medical college for dissection, etc., unless relatives or friends do not consent, or deceased requested to be buried, or was a stranger or traveller (Gen. Stat., sec. 4,428).

Bodies of convicts dying in State prison and not having any known relatives, shall be delivered to medical institution of Yale College (Gen. Stat., sec. 4,432).

Body of one dying in a hospital shall not be examined unless father, etc., consent, or if none, within forty-eight hours after death (Gen. Stat., sec. 4,435).

Removal of body from grave unlawfully, or receiving, secreting, or dissecting same is punishable (Gen. Stat., sec. 1,377).

Body of executed criminal shall be buried by prison warden (Gen. Stat., sec. 1,527).

Delaware.

Coroner to hold inquest, etc., and may cause body to be disinterred (R. L., ch. 33).

Removal of body from grave unlawfully, a misdemeanor (Laws, 1883, ch. 234).

Florida.

Buying, selling, or having possession for purpose of buying or selling, a dead body is punishable (R. L., sec. 2,625).

Concealing birth of issue which if born alive would be a bastard, is punishable (R. L., sec. 2,393).

Coroner to hold inquest, etc. (R. L., secs. 3,011, 3,019).

Georgia.

Concealing birth of issue which if born alive would be a bastard is a misdemeanor (Code, Part III., sec. 79).

Coroner to hold inquest on body or to disinter same for inquisition (Code, Part III., secs. 417, 1,255 *et seq.*).

Public officers and their assistants, and their deputies of every county, city, town, or other municipality, or of every prison, chain gang, penitentiary, county morgue, or public hospital, having control of dead body to be buried at public expense (not dying of infectious disease), shall deliver same to medical college for dissection, etc., unless claimed by friends or relatives or such friends or relatives request same to be buried, or unless deceased was a stranger or traveller (Laws, 1887, vol. 2, p. 77).

Removal of body from grave, etc., unlawfully for dissection or sale is a crime; or receiving or purchasing it knowing it to have been so taken, or trafficking in dead bodies, or having them conveyed without the State for sale, etc., is a crime (Code, Part III., sec. 415).

Hawaii.

Concealing birth of issue which if born alive would be a bastard is punishable (Pen. Laws [1897], sec. 85).

Official authorized to act as coroner to hold inquest (Pen. Laws [1897], secs. 973 *et seq.*).

Unlawful disinterment is punishable by fine or imprisonment (Pen. Laws [1897], sec. 986).

Coroner to view and bury body of stranger (Pen. Laws [1897], sec. 984).

Idaho.

Coroner to hold inquest, etc., and may exhume body for that purpose (Pen. Code, secs. 5,773 *et seq.*).

Coroner to bury body decently when not claimed by relatives, etc., and if necessary at expense of county (Polit. Code, sec. 1,702).

Illinois.

Removal of body unlawfully or aiding in such removal is punishable as a felony—one to ten years' imprisonment (Crim. Code, sec. 138).

Coroner to hold inquest, etc. (R. S., ch. 31).

And to deliver body to friends or bury decently if no friends claim it, if necessary at county expense (R. S., ch. 31, sec. 24).

Body of executed criminal may be delivered to any physician or surgeon for dissection unless friends object (Crim. Code, sec. 443).

Any public officer in whose custody the body of a deceased person required to be buried at public expense shall be, shall when requested deliver the remains to medical college or physician or surgeon, after notice to relatives or guardians of deceased, unless such relatives shall demand body for burial; such medical college, etc., must give bond that it will use body for dissection; buying or selling it is a misdemeanor; after dissection body must be buried or cremated by medical college, etc. (R. S., ch. 91, secs. 1–4).

Indian Territory.

Removal of dead body for the purpose of dissection, or stealing, or from wantonness, or purchase of body known to be so removed, is a misdemeanor (Ann. Stat. [1899], secs. 1,245 *et seq.*).

Indiana.

Removal of dead body or part of same unlawfully is a felony (R. S. [1897], secs. 2,322, 2,323).

Concealment of body or part thereof, which has been unlawfully used for dissection, is a felony (R. S. [1897], sec. 2,324).

Receiving or buying a body, knowing it to have been unlawfully disinterred, is a felony (R. S. [1897], sec. 2,325).

Dead body of one dying in a State, city, or county prison or jail, or county asylum or infirmary or public hospital, or dead body of an executed criminal, or dead body of a vagrant, or one killed while committing a felony or escaping from prison or officers, may be delivered to the faculty of a medical college in State for dissection, etc., unless deceased requested to be buried or body is claimed by next of kin (R. S. [1897], secs. 5,829 *et seq.*).

Dissecting or possessing body for dissection except as prescribed by law is a felony (R. S. [1897], sec. 5,842).

Coroner to hold inquest, etc. (R. S. [1897], secs. 8,337 *et seq.*).

Iowa.

Coroner to hold inquest, etc. (Code [1897], secs. 515 *et seq.*).

To bury body decently at expense of county, if necessary, or deliver it to friends (Code [1897], sec. 527).

Removal, etc., of dead body unlawfully, or aiding such removal or knowingly receiving body so removed, etc., is punishable (Code [1897], sec. 4,945).

Coroner, undertaker, superintendent of public asylum, hospital, poorhouse, or penitentiary, may deliver body to medical college or physician for dissection, etc., unless relatives, etc., refuse, or deceased desired to be buried, and after such use the remains shall be interred (Code [1897], secs. 4,946 *et seq.*).

Bodies of those executed, or dying in hospitals or prisons under sentence for crime, shall be delivered to medical college or association or any physician or surgeon for dissection, etc., unless relatives or friends do not consent, or body shall have been interred, or is not claimed by relatives, or deceased expressed a wish to be buried, and after such use the remains shall be interred (Gen. Stat., sec. 3,758).

State board of health shall issue permits for transportation of bodies beyond county where death occurred (Gen. Stat., sec. 6,030).

Kansas.

Coroner to hold inquest, etc. (Gen. Stat. [1901], secs. 1,761 *et seq.*).

To bury body if not claimed by friends, etc., and at public expense, if necessary (Gen. Stat. [1901], sec. 1,773).

Removal of a body unlawfully, for dissection or wantonly, or receiving body knowing it to have been so removed, is a misdemeanor (Gen. Stat. [1901], secs. 2,224 *et seq.*).

Body of criminal or unclaimed person which would otherwise be buried in the Potter's Field may be claimed and received by medical college for study, etc., which shall give bond that remains will be used for such purpose, unless deceased requested to be buried or body is claimed by friends, etc., and not until after search for such friends, etc. (Gen. Stat. [1901], secs. 4,025 *et seq.*).

KENTUCKY.

Coroner to hold inquest, etc. (Stat. [1903], secs. 528, 533).

To bury the body or deliver to friends (Stat. [1903], sec. 531).

Body of one dying on a steamboat, or other craft, if not claimed by friends, shall be buried by master or officer in command, on shore, at least four feet deep (Stat. [1903], sec. 1,334).

Removal of body unlawfully from grave is punishable (Stat. [1903], sec. 1,335).

Any person who brings ashore a body from a navigable stream shall receive a reward of $5 (Stat. [1903], sec. 4,286).

Body in possession of any person, unclaimed for three days by friends, etc., after notice to them, if they are known, to be delivered to medical college on request of professor thereof, and may be embalmed, and dissected if unclaimed after thirty days; medical college to give bond that bodies will be used for such purpose, and to bury bodies (Stat. [1903], secs. 2,644 *et seq.*).

Concealing birth of child which if born alive would be a bastard is punishable by imprisonment (Stat. [1903], sec. 1,220).

LOUISIANA.

Coroner shall hold inquest, etc., and bury body when not claimed by friends (Wolff Const. & Rev. L., secs. 653–660).

MAINE.

Coroner to hold inquest, etc. (R. S., ch. 140, sec. 1).

To bury the body at State or town expense (R. S., ch. 140, sec. 11).

Seizure of body on execution, punishable (R. S., ch. 125, sec. 31).

Permit to bury or disinter to be obtained from town clerk, etc. (R. S., ch. 61, secs. 23, 24, 28).

Removal, etc., of body unlawfully, or receiving it knowingly, or exposing, etc, body, is punishable (R. S., ch. 125, sec. 32).

Bodies of destitute persons may be buried and the expense recovered from the town (R. S., ch. 27, sec. 37).

If any resident request or consent that his body be delivered to a physician or surgeon for dissection, it may be so delivered, unless kindred or family connection objects (R. S., ch. 17, sec. 1).

Professors of incorporated medical colleges, a board to receive and distribute dead bodies for dissection of persons dying in prisons, unless the deceased requested to be buried; or, in almshouses, unclaimed by relations (R. S., ch. 17, secs. 2–8; ch. 82, sec. 59).

Traffic in dead bodies to outside the State, punishable (R. S., ch. 17, sec. 6).

Maryland.

Coroner to hold inquest, etc. (Md. Code, art. 22, secs. 3, 4).

Shall bury the body, when necessary, at public expense (Md. Code, art. 22, sec. 7).

Removal, etc., from graveyard, etc. (except Potter's Field), of a body is a misdemeanor (Md. Code, art. 27, secs. 133, 134).

Permit of register required for burial (Md. Code, art. 43, sec. 6 E).

Massachusetts.

Court on report of medical examiners shall hold inquest, etc. (R. L., ch. 24, sec. 11). (See article Coroners and Medical Examiners.)

And shall deliver it to relatives or friends, or, if no one claims it, to overseer of poor, etc., for burial (R. L., ch. 24, sec. 21).

Body shall not be buried in city or town or removed therefrom without a permit (R. L., ch. 78, sec. 38).

Body of one dying of infectious disease shall not be transported without permit, and only in a sealed case (R. L., ch. 78, sec. 43).

Embalming fluid shall not be injected in body of one supposed to have died by violence without medical examiner's permit (R. L., ch. 24, sec. 20).

Body shall not be cremated without permit and inquest by medical examiner, or within forty-eight hours after death, unless death was occasioned by contagious disease (R. L., ch. 78, sec. 37).

Overseers of poor, etc., or superintendent of State almshouse or workhouse, or commissioner of public institutions of Boston, may deliver body of person required to be buried at public expense to any physician or surgeon or medical college, unless deceased requested to be buried, or relatives request burial or claim it, or deceased was a stranger or traveller or veteran soldier (R. L., ch. 77, secs. 1–4).

Body of criminal executed shall be delivered for dissection to a medical college if requested; if not, to friends or relatives, or, if none, to any physician or surgeon (R. L., ch. 77, sec. 4).

Removal of body unlawfully from grave is punishable, or buying, selling, or possessing for unlawful purpose, is punishable (R. L., ch. 212, secs. 64–65).

Concealing birth of child which if born alive would be a bastard, is punishable (R. L., ch. 212, sec. 17).

Seizing dead body on execution is punishable (R. L., ch. 212, sec. 63).

Body of a pauper prisoner shall be buried by overseers of poor or sheriff at town expense if not claimed by relatives or friends (R. L., ch. 81, sec. 29; ch. 224, sec. 22).

Transportation regulated (R. L., ch. 78, sec. 43).

Michigan.

Justice of the peace or coroners in a city where they reside, to hold inquest, and bodies may be disinterred on order of justice (comp. Laws, secs. 11,818 *et seq.*).

And the body shall be buried at the State or town expense if a stranger (comp. Laws, secs. 11,828, 11,834).

Woman concealing death of issue which if born alive would be a bastard, is punishable (comp. Laws, sec. 11,695).

Board of health, officers, sheriff, etc., of any prison, etc., poorhouse, almshouse, having body required to be buried at public expense, shall, if not claimed by relatives, unless it died of certain infectious diseases, deliver it to University of Michigan, etc., for dissection, etc. (comp. Laws, secs. 5,897 *et seq.*).

Board of health may regulate burials (comp. Laws, sec. 4,414).

Body shall not be shipped out of State nor used in State for any purpose but anatomical study (comp. Laws, sec. 5,899).

Removal of body unlawfully is punishable—fine or imprisonment (comp. Laws, sec. 11,710).

Minnesota.

Violating sepulture and remains of dead (Pen. Code, secs. 6,558–6,568, same as N. Y. Pen. Code, secs. 305–315 [*q. v.*], except that sec. 267 lacks subd. 4 of sec. 308, N. Y. Pen. Code).

Concealing birth of child which died before or after birth is a misdemeanor (Pen. Code, sec. 254).

Coroner to hold inquest, etc. (Gen. Stat. [1894], secs. 843 *et seq.*).

And cause body to be buried at expense of county (Gen. Stat. [1894], sec. 853).

Body must be buried within four days, and if death was from contagious disease, within twenty-four hours and in a tightly sealed coffin which must not be reopened (Gen. Stat. [1894], sec. 7,071).

Common councils and village councils may regulate burials (Gen. Stat. [1894], secs. 1,085, 1,299).

Wardens, superintendents of poor, and other persons having control of bodies shall deliver same to medical college committee, for dissection, unless claimed by relatives or friends, or relatives or friends do not consent, or one detained as a witness or on suspicion of having committed a crime, or deceased requested to be buried (Gen. Stat. [1894], sec. 8,031).

Mississippi.

Bodies of paupers and strangers to be buried (Ann. Code, secs. 3,145, 3,146).

Coroner to hold inquest, etc. (Ann. Code, sec. 816).

Removal of body unlawfully and wantonly, for sale or receiving same, is punishable (Ann. Code, secs. 1,023, 1,024).

Missouri.

Coroner to hold inquest, etc. (R. S. [1899], secs. 6,629 *et seq.*).

And shall bury the body, if not claimed by friends, at public expense (R. S. [1899], sec. 6,647).

And may direct a chemical analysis and microscopical examination of body when poisoning is suspected (R. S. [1899], sec. 6,660).

Coroner may pay reward of $1 or less for floating body brought ashore (R. S. [1899], sec. 6,648).

Superintendents or wardens of penitentiaries, houses of correction, insane asylums, poorhouses, and coroners, sheriffs, city and county undertakers, having charge of a body required to be buried at public expense, shall deliver the same to medical college for dissection unless claimed by relatives or friends, and trafficking in such bodies is a misdemeanor (R. S. [1899], secs. 8,519 *et seq.*).

Concealing birth of child, so that it may not be known whether it was born alive or dead, is a felony (R. S. [1899], sec. 1,836).

Removal of dead body from grave without authority (except that of criminal executed for crime, for purposes of dissection, etc.), or receiving such body knowingly, is a felony (R. S. [1899], secs. 2,229 *et seq.*).

Montana.

Coroner to hold inquest, etc. (Pen. Code, secs. 2,790 *et seq.*).

And bury body at public expense if not claimed by relatives, etc. (Polit. Code, sec. 4,491).

Pen. Code, secs. 510–515, is the same as California, Pen. Code, secs. 290–295 (*q. v.*).

Nebraska.

Coroner to hold inquest, etc. (comp. Stat. [1903], sec. 2,493).

To bury body if not claimed by friends (comp. Stat. [1903], sec. 2,507).

Removal of body from grave without authority, for sale, dissection, etc., is a felony (comp. Stat. [1903], secs. 7,926–7,928).

Exposing or abandoning a dead body in any public place or river, etc., is a felony (comp. Stat. [1903], secs. 7,926–7,928).

Dissection for scientific, etc., purposes, is lawful; coroner, sheriff, jailor, undertaker, etc., shall deliver uninterred bodies in his charge, suitable for scientific purposes, to medical colleges, or to physicians if there is a surplus, if friends, etc., consent or are not known; medical college shall give bond that dissection will be inoffensive; such bodies shall not be transported without the State (comp. Stat. [1903], secs. 4,342 *et seq.*).

Nevada.

Justice of peace acting as coroner to hold inquest, etc. (Cutting's comp. Laws, secs. 2,423 *et seq.*).

And cause the body to be buried at public expense (Cutting's comp. Laws, sec. 2,441).

Body shall not be buried without certificate of physician or coroner (Cutting's comp. Laws, secs. 4,987 *et seq.*).

Body shall not be transported out of State without a permit (Cutting's comp. Laws, secs. 4,985, 4,986).

Concealing birth of child which if born alive would be a bastard is punishable (Cutting's comp. Laws, sec. 4,688).

Non-residents and paupers to be buried at public expense (Cutting's comp. Laws, sec. 2,159).

New Hampshire.

Coroner to hold inquest, etc. (Pub. Stat., ch. 262, secs. 1 *et seq.*).

And bury body, if a stranger, at public expense (Pub. Stat., ch. 262, sec. 16).

Concealing birth of child which if born alive would be a bastard is punishable (Pub. Stat., ch. 278, sec. 14).

Body of person dying in a county, city, or town, or State prison or jail, or any other body required to be buried at public expense, shall be delivered to any physician or medical college for dissection, etc., on having been requested so to do, unless deceased requested to be buried, or any persons claim and bury it, or deceased was a stranger or traveller who died suddenly, except tramps, or had served in the army or navy in time of war (Pub. Stat., ch. 136).

Body not to be buried without permit or disinterred (Pub. Stat., ch. 173, sec. 6).

Removal of dead body without authority, or concealing it, knowing it to have been so dug up, is punishable (Pub. Stat., ch. 266, sec. 7).

Boards of health in cities have charge of granting permits for burial and removal of dead, which shall not be done without such permit (Laws, 1895, ch. 53, sec. 1).

Embalming without permission of physician, etc., or if criminal cause is suspected, before legal investigation of facts, is a misdemeanor (Laws, 1899, ch. 76, secs. 5, 6).

New Jersey.

Coroner to hold inquest, etc. (Gen. Stat. [1896], vol. i., p. 897 *et seq.*).

And bury body if not claimed by friends; also bodies thrown upon shore from shipwreck (Gen. Stat. [1896], vol. i., p. 898, sec. 5; p. 900, sec. 16 *et seq.*; p. 901, sec. 21).

Concealing birth of child which if born alive would be a bastard is a misdemeanor (Gen. Stat. [1896], vol. i., p. 1064, sec. 83).

Body of executed criminal may be delivered to physician, etc., for dissection, unless claimed by friends or relatives (Gen. Stat. [1896], vol. i., p. 1,062, sec. 61; p. 1,092, sec. 233).

Removal of a body without authority, for sale, dissection, etc., is a high misdemeanor (Gen. Stat. [1896], vol. i., p. 1,071, sec. 122).

Exposing body of an executed murderer is a misdemeanor (Gen. Stat. [1896], vol. i., p. 1,098, sec. 261).

Body must not be buried without a permit; nor body brought into the State without permit; nor taken out of State without permit (Gen. Stat. [1896], p. 2,007, secs. 15 *et seq.*).

Burial and disinterment regulated; bodies must be buried at least four feet deep, etc. (Gen. Stat. [1896], vol. i., p. 354, sec. 28; p. 356, sec. 41; p. 357, sec. 45).

Bodies in possession of any county or other officer, or almshouse, hospital, etc., required to be buried at public expense, to be delivered to incorporated medical association, unless claimed for burial by a relative, or deceased person was a traveller who

died suddenly. Such association to give bond that bodies will be used for scientific purposes and to pay expenses. Selling such bodies is punishable (Gen. Stat. [1896], vol. i., p. 2,088, sec. 48).

New Mexico.

Justice of the peace to hold inquest, etc. (comp. Laws [1897], secs. 3,373 *et seq.*).

And bury the body (comp. Laws [1899], sec. 3,377).

Body of one dying of a contagious disease shall not be carried in an open coffin, or be exposed (comp. Laws, [1897], sec. 3,713).

Body shall not be buried within fifty yards of running stream (comp. Laws [1897], secs. 1,283, 1,284).

New York.

Any person has absolute right to direct disposal of his body (Pen. Code, sec. 305).

Except when dissection is permitted, human bodies must be buried (Pen. Code, sec. 306).

But bodies may be transported through State and buried elsewhere (Pen. Code, sec. 307).

Dissection is permitted (1) as regulated by special statutes; (2) also in coroner's inquest; (3) when authorized by husband, etc., to discover cause of death; (4) and when deemed necessary by district attorney, who may exhume body for the purpose (Pen. Code, sec. 308).

Unlawful dissection is a misdemeanor (Pen. Code, sec. 309).

After dissection remains must be buried (Pen. Code, sec. 310).

Unlawful removal of a dead body, etc., is punishable—fine or imprisonment or both (Pen. Code, sec. 311).

Receiving such body is punishable by imprisonment (Pen. Code, sec. 312).

Opening grave unlawfully is punishable by fine or imprisonment or both (Pen. Code, sec. 313).

Arrest or attachment of dead body is a misdemeanor (Pen. Code, sec. 314).

Disturbing a funeral is a misdemeanor (Pen. Code, sec. 315).

Removal of bodies from cemeteries is permitted under cer-

tain circumstances (Memb. Corp. Law [Gen. Laws, ch. 43], sec. 51).

Embalmers must be licensed by State board of examiners (Laws, 1898, ch. 555; am'd, Laws, 1899, ch. 324).

Boards of health may regulate burials (Pub. Health Law [Gen. Laws, ch. 25], sec. 23).

Transfer of body of one who died of a contagious or infectious disease shall be in hermetically sealed casket (Laws, 1893, ch. 661, sec. 23).

Bodies of those dying in, or in custody of managers, etc., of, any prison, asylum, morgue, hospital, or in possession of undertakers, shall be delivered to medical college of this State, etc., for purpose of medical study, unless claimed by relatives or friends, or friends or relatives do not assent to such disposal, or deceased requested during last illness to be buried (Pub. Health Law [Gen. Laws, ch. 25], secs. 217, 218).

Concealing birth of child born dead or alive is a misdemeanor. Concealing still-birth of child which if born alive would have been a bastard is punishable on second offence by imprisonment —two to five years (Penal Code, secs. 296, 698).

In certain cases bodies of convicts, unless claimed, shall be delivered to certain medical colleges (R. S., pt. 4, ch. 3, secs. 132, 133).

Coroner to hold inquest, etc. (Code Crim. Proc., secs. 773 *et seq.*).

North Carolina.

Coroner to hold inquest, etc. (Code, sec. 657).

Concealing birth of child, by burying dead body, is a misdemeanor. Opening grave without authority for purpose of taking body is a felony (Laws, 1885, ch. 90).

Coroner may order a chemical analysis of remains (Laws, 1887, ch. 269).

Dead body of convict, unclaimed by friends, shall be delivered to medical college, except such dying of contagious disease (Laws, 1891, ch. 129).

Body of one dying of contagious disease must not be transported by common carrier until disinfected, nor shall permit for removal be issued until such disinfection (Laws, 1893, ch. 214, sec. 16).

North Dakota.

Coroner to hold inquest, etc. (Rev. Codes, secs. 2,009 *et seq.*).

And bury the body if not claimed by friends, etc. (Rev. Codes, sec. 2,020).

Concealing birth of child which if born alive would be a bastard, or death of such child dying within two years after birth, is punishable (Rev. Codes, sec. 7,179).

Rev. Codes.			
Sec. 7,188	same as	305	N. Y. P. C.
" 7,189	"	306	"
" 7,190	"	307	"
" 7,191	"	308 (1–3)	"
" 7,192	"	309	"
" 7,193	"	310	"
" 7,198	"	311	"
" 7,199	"	312	"
" 7,202	"	314	"

Duty of burial of married woman, on husband. Other than married woman, on nearest of kin who is an adult or has means sufficient (Rev. Codes, sec. 7,195).

Refusal to bury by one on whom duty is imposed by law, a misdemeanor (Rev. Codes, sec. 7,196).

Custody of body pertains to one whose duty it is to bury (Rev. Codes, sec. 7,197).

When cemetery is by law changed to other place, duty is on relative to move body (Rev. Codes, sec. 7,201).

Unlawful removal of dead body is punishable by fine or imprisonment or both (Rev. Codes, sec. 7,200).

Body of executed criminal, and those dying in State penitentiary or county jail under sentence, shall be delivered to medical college or any physician for dissection, unless deceased requested to be buried, or friends ask to have it buried, or deceased was a stranger or traveller (Rev. Codes, secs. 281 *et seq.*).

Ohio.

Coroner to hold inquest, etc. (R. S., secs. 1,221 *et seq.*).

And bury body, etc. (R. S., secs. 1,225 *a*, 1,227).

Body of unclaimed dead, not an inmate of any penal, charitable, or reformatory institution, and not claimed by relative or delivered for dissection according to law, shall be buried at public expense (R. S., sec. 1,500 *a*).

Corpse shall not be conveyed to or from a city without a permit (R. S., sec. 2,119).

Bodies of those dying in city hospitals, city or county infirmaries, work-houses, asylums, charitable institutions, penitentiaries, or jails, which are required to be buried at public expense, shall be delivered to medical college or society for study, etc., unless claimed by relative, or deceased was a stranger or traveller (except tramps) (R. S., sec. 3,763).

Unlawful use of such bodies is punishable (R. S., sec. 7,035). If such bodies bear marks of violence, not to notify coroner is punishable (R. S., sec. 7,034 *a*).

Removing body from grave without authority for dissection, or receiving such body, is punishable (R. S., sec. 7,034).

Body of executed criminal, if not claimed by relative or friends, may be delivered for dissection, etc. (R. S., sec. 7,343, 1).

City and village councils have power to regulate interments, etc. (R. S., sec. 2,548 *et seq.*).

Oklahoma.

Coroner to hold inquest, etc. (Stat., secs. 1,745 *et seq.*).

And bury the body at public expense if not claimed by relatives (Stat., sec. 1,759).

Concealing birth of issue which if born alive, etc., or dying within two years after birth, is punishable (Stat., sec. 2,179).

2,188–2,190	same as	305–307	N. Y. P. C.	
2,191	"	308	"	(except subd. 4)
2,192–2,193	"	309–310	"	
2,198	"	311	"	(ex. punishment)
2,199	"	312	"	
2,202	"	314	"	

Custody is in him whose duty it is to bury (Stat., sec. 2,197).

Duty of burial of married woman, on husband; other than mar-

ried woman, on nearest of kin who is an adult and has sufficient means (Stat., sec. 2,195).

Refusal to bury by one on whom duty rests is a misdemeanor (Stat., sec. 2,196).

Oregon.

Coroner to hold inquest, etc. (B. & C.'s Codes, secs. 1,683 *et seq.*).

And bury body if not claimed by friends (B. & C.'s Codes, sec. 1,692).

Unmarried woman concealing birth of child so that it may not be known whether it was born alive or not, is punishable (B. & C.'s Codes, sec. 1,923).

Bodies of criminals executed, those dying in hospitals, insane asylums, almshouses, or penitentiaries, may be delivered to medical college or physician for dissection, etc., unless they shall have been interred, or claimed by relatives, or relatives and friends do not consent, or deceased expressed a wish to be buried; and they shall be used for such purpose only and in this State (B. & C.'s Codes & Stat., secs. 3,826 *et seq.*).

Removal of body without authority, etc., is punishable (B. & C.'s Codes, sec. 1,940).

Pennsylvania.

Coroner to hold inquest in Philadelphia County only in case of a violent death (Bright Pen. Dig., 1536, sec. 37).

And may in Berks and Lancaster Counties order a post mortem (Bright Pen. Dig., 1536, sec. 38).

Concealing death of child which if born alive would be a bastard is punishable (Bright Pen. Dig., 431, sec. 158).

Removal of body from grave without authority is a misdemeanor (Bright Pen. Dig., 229, sec. 11).

Bodies of those dying in almshouse, hospital, prison, or public institution, or those in morgue, which are required to be buried at public expense, shall be delivered to medical college, physician, etc., to be used for scientific purposes only, unless claimed by relatives or deceased was a traveller, and trafficking in such bodies is a misdemeanor (Bright Pen. Dig., p. 9, secs. 1 *et seq.*; 1897, P. L. 36, sec. 1).

Rhode Island.

Concealing death of child which if born alive would be a bastard, so that it may not be known, etc., is punishable (Gen. Laws [1896], ch. 281, secs. 10, 11).

Seizing dead body under execution is punishable (Gen. Laws [1896], ch. 257, sec. 2).

Bodies of those dying in jail shall, if not claimed by relatives, be buried at public expense (Gen. Laws [1896], ch. 230, sec. 31).

Medical examiner to make autopsy and may have chemical examination made (Gen. Laws [1896], ch. 287, secs. 8, 23).

And bury body of stranger at State expense if necessary (Gen. Laws [1896], ch. 281, sec. 24).

Burials are prohibited without physician's, etc., death certificate (Gen. Laws [1896], ch. 100, secs. 7 *et seq.*).

Coroner to hold inquest if, in opinion of medical examiner, death was caused by act of some one other than deceased (Gen. Laws [1896], ch. 287, secs. 16 *et seq.*).

Secretly disinterring or removing body or concealing such body is punishable by fine or imprisonment (Gen. Laws [1896], ch. 281, sec. 21).

South Carolina.

Coroner to hold inquest, etc. (R. L., secs. 711, 2,664 *et seq.*).

And may have body disinterred for inquisition (R. L., sec. 2,687).

South Dakota.

Coroner to hold inquest, etc. (Polit. Code, secs. 899 *et seq.*).

And bury body if not claimed by friends, etc. (Polit. Code, sec. 911).

Concealing birth of child which if born alive would be a bastard, or death of such child within two years of birth, punishable (Pen. Code, secs. 344, 794).

Any person has absolute right to direct disposal of his body (Pen. Code, sec. 353).

Except when dissection is permitted, bodies must be buried (Pen. Code, sec. 354).

But bodies may be transported through State and buried elsewhere (Pen. Code, sec. 355).

Dissection permitted, as regulated by positive statutes; also in inquest; also when authorized by husband, etc., to discover cause of death (Pen. Code, sec. 356).

Dissection permitted of person in charitable hospital to determine cause of death; provided next of kin consent, if any (Pen. Code, sec. 356).

Unlawful dissection a misdemeanor (Pen. Code, sec. 357).

After dissection body to be buried (Pen. Code, sec. 358).

Provisions apply to amputated members (Pen. Code, sec. 359).

Pen. Code, secs. 360–362, same as North Dakota, Rev. Codes, secs. 7,195–7,197, *q.v.*

Pen. Code, secs. 363, 364, 367, same as New York, Pen. Code, secs. 311, 312, 314, *q.v.*

Pen. Code, secs. 365, 366, same as North Dakota, Rev. Codes, secs. 7,200, 7,201, *q.v.*

Tennessee.

Coroner to hold inquest, etc. (Code [1896], secs. 335, 7,274 *et seq.*).

And may order a chemical analysis of remains, etc. (Code [1896], sec. 7,282).

Body to be buried, if not claimed by relatives, etc., at public expense if necessary (Code [1896], sec. 7,292).

Wilfully and improperly exposing or abandoning a dead body is a misdemeanor (Code [1896], sec. 6,771).

Removing or purchasing dead bodies without authority is a misdemeanor (Code [1896], secs. 6,772 *et seq.*, 3,117, 3,118).

Body of deceased convict to be buried unless claimed by friends (Code [1896], sec. 7,549).

Texas.

Justice of the peace to hold inquest, etc. (Code Crim. P., arts. 1,023 *et seq.*).

And may disinter the body for such inquisition (Code Crim. P., art. 1,024).

Removal, etc., of dead body from grave without authority is punishable by fine (Pen. Code, art. 367).

Bodies of convicts to be buried (Sayles' C. Stat., art. 3,720).

Utah.

Justice of peace to hold inquest, etc. (Rev. Stat. [1898], secs. 1,221 *et seq.*).

And may order chemical analysis (Rev. Stat. [1898], sec. 1,230).

And bury the body, if unclaimed, at county expense, if necessary (Rev. Stat. [1898], sec. 1,237).

Unlawful removal of dead body a felony (Rev. Stat. [1898], sec. 4,230).

City councils and county commissioners may provide for burial of indigent dead (Rev. Stat. [1898], secs. 206, sub. 79; 511, sub. 42).

Burial not to be permitted without death certificate, as regulated by city councils and county commissioners (Rev. Stat. [1898], sec. 2,035).

Vermont.

Justice of the peace to hold inquest, etc. (Stat. [1894], secs. 4,713 *et seq.*).

Removal, etc., of dead body without authority is punishable (Stat. [1894], secs. 5.004 *et seq.*).

Bodies of those dying in poorhouse or other public institution, which are required to be buried at public expense, may be delivered to any physician for dissection, etc., unless deceased requested to be buried, or friends or relations request burial, or deceased was a stranger or traveller. Such body shall not be removed from State, and shall be used for scientific purposes only (Stat. [1894], secs. 4,641 *et seq.*).

Bodies of persons dying of certain contagious diseases to be wrapped in certain disinfectants and buried at once; of persons dying of certain other contagious diseases may be transported as prescribed; no body to be transported without certificate, etc. (Stat. [1894], secs. 4,687 *et seq.*).

Mother of illegitimate child found dead under suspicious circumstances, of which she was privately delivered, may be found guilty of a felony, though evidence is insufficient to convict her of murder (Stat. [1894], secs. 4,890, 4,891).

Virginia.

Coroner to hold inquest, etc. (Code, secs. 3,938 *et seq.*).

And to bury the body at public expense (Code, sec. 3,946).

Removal, etc., of dead body from grave without authority, is punishable (Code, sec. 3,794).

Bodies of those dying on vessels in State shall be buried by master on the shore above high-water mark (Code, sec. 2,002).

Bodies of those dying in almshouse, prison, morgue, hospital, jail, or other public institution, which are required to be buried at public expense, and bodies of criminals executed for crime, shall be delivered to medical college, etc., and physician or surgeon for anatomical study, unless (except criminals) relatives and friends claim the body or deceased was a stranger or traveller; and such bodies shall not be sent out of the State (Code, secs. 1,776 *et seq.*).

Bodies of persons dying of certain contagious diseases must be transported as prescribed (Code, sec. 1,743 *f*).

Embalmers must be licensed (Code, sec. 1,743 *g*).

Washington.

Coroner to hold inquest, etc. (Hill's Stat., vol. 1, secs. 245 *et seq.*).

And bury body, if not claimed by friends, at public expense (Hill's Stat., vol. 1, sec. 257).

Bodies of those dying in poorhouse, public hospital, county jail, state prison, etc., which are required to be buried at public expense, shall be delivered to medical college, physician, surgeon, etc., for study, unless deceased requested to be buried, or it is claimed by friends or relatives, or deceased was a stranger or traveller; and such body shall be used only in the State (Hill's Stat., vol. 1, secs. 2,428 *et seq.*).

Removal, etc., of body from the grave without authority is punishable (Pen. Code, sec. 208).

West Virginia.

Coroner to hold inquest, etc. (Code, ch. 154).

And bury the body at public expense, or if of a stranger, may forward it to its destination or bury it (Code, ch. 154, sec. 8).

Removal, etc., of a body from grave is punishable (Code, ch. 149, sec. 13).

Wisconsin.

Justice of the peace or coroner to hold inquest, etc. (S. & B. Ann. Stat., ch. 200).

And shall cause the body to be buried at public expense (S. & B. Ann. Stat., ch. 200, sec. 4,877).

Dead body of convict shall, if not claimed by relatives or friends, be buried (S. & B. Ann. Stat., sec. 4,926).

Removal, etc., of body from grave without authority is punishable (S. & B. Ann. Stat., sec. 4,592).

Concealing death of child which if born alive would be a bastard, is punishable (S. & B. Ann. Stat., sec. 4,585).

A public officer having in his charge a body required to be buried at public expense, shall deliver same to members of State or county medical society, etc., for anatomical study, unless claimed by relatives, or they do not consent to such disposal, or deceased requested to be buried, or was a stranger or traveller (S. & B. Ann. Stat., sec. 1,437).

Wyoming.

Coroner to hold inquest, etc. (Rev. Stat. [1899], secs. 1,173 *et seq.*).

And may order examination (Rev. Stat. [1899], sec. 1,182).

And to bury body, if unclaimed, at public expense, if necessary (Rev. Stat. [1899], sec. 1,180).

Unlawful disinterment of dead body is punishable by fine (Rev. Stat. [1899], sec. 4,983).

THE POWERS AND DUTIES

OF

CORONERS AND MEDICAL EXAMINERS.

THE CORONER AND HIS COURT; THE JURY AND INQUEST; THE EFFECT OF THE EVIDENCE AND VERDICT.

BY

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POWERS AND DUTIES OF CORONERS AND MEDICAL EXAMINERS.

I. THE CORONER AND HIS COURT.

Coroner an Ancient Officer.—The office of coroner is one of the most important and ancient known to the common law. A coroner, or *coronator*, was so called because he had principally to do with the pleas of the crown, or suit wherein the king was immediately concerned.[1] The office is first mentioned in a charter granted in the year 925 by King Athelstan, to the authorities of Beverley. The office as at present constituted was not clearly established until after the Norman conquest.

Under this head come the lord chief justice and puisne justices of the King's Bench, who are supreme and sovereign coroners respectively.[2] The duties of the office of coroner involve questions of the greatest interest to society, to government, and to the rights and privileges of the individual citizen. The office has lost much of the honor and respect which formerly appertained to it. Its character and importance have been much diminished in latter times, making striking contrast with the high estimation it was held in by our ancestors in days when none but the gentry and knights of the shire were deemed eligible.

In fact, so great was the dignity of this office in ancient times that it was never presumed that coroners would condescend to be paid for their services.[3] They were chosen by all the freeholders of the county court for life or good behavior, and were liable to be removed for cause by the writ *de coronatore exonerando.* There were three kinds of coroners at common law: *Virtute officii; virtute cartæ sive commissionis;* and *virtute electionis.*[4] The office of coroner was brought to America by the colonists alon with the institutions of the common law, and may be said to ex-

[1] Am. & Eng. Enc. of Law, vol. 4, p. 171; 2d ed., vol. 7, p. 599. See also Cyclopædia of Law and Procedure, vol. 9, p. 980 *ff.*

[2] 4 Co., 57; 3 Com. Dig., 242.

[3] 1 Black. Com., 347.

[4] Am. & Eng. Enc. of Law, vol. 4, p. 173; 2d ed., vol. 7, p. 599.

ist in the several States with all the common-law incidents, except so far as they may have been modified by statute. The present defined powers of coroners in Great Britain and the United States, unless modified by British statutes and American acts, are derived from the English Stat. de Officio Coronatoris, 4 Edward I., s. 2. Coroners *virtute officii* and *virtute cartæ sive commissionis* are unknown to our institutions. Here the office of coroner may be classed under the head of coroners *virtute electionis.* Generally speaking, the coroner is a county officer.

Coroner's Duties Both Judicial and Ministerial.

By the common law his powers and duties are both judicial and ministerial. In his ministerial capacity he is merely a substitute for the sheriff, as when the sheriff is a party.[1] His powers and duties thereunder it is not the present purpose to state and define. His judicial authority relates to inquiries into cases of sudden death, by a jury of inquest, *super visum corporis*, or, as it is more commonly defined, an inquisition, with the assistance of a jury, over the body of any person who may have come to a sudden or violent death, or who may have died in prison.[2] It is not necessary that the death should be both violent and sudden, and that both these circumstances must concur to give the coroner jurisdiction. It is sufficient to give the coroner jurisdiction if the death occurs from any violence done to a person by another, although such violence may not have terminated the life of a party suddenly, and it is still the duty of the coroner to hold an inquest.[3] Indeed, the presumption is that he has acted in good faith and on sufficient cause.[4] And so when several persons

[1] Giles *v.* Brown, 1 Mill (S. C.) Const., 230; People *v.* Devine, 44 Cal., 452.

[2] Bouvier's Law Dict., vol. 1, p. 405.

[3] Lancaster County *v.* Dern, 2 Grant (Pa.), 262. In this case a concussion or collision took place in a street between the sleighs of two parties, whereby a woman sustained an injury by the shaft, or some other part of one of the parties' sleighs, striking her immediately above the eye and penetrating the brain. Surgical aid was immediately called in, and the woman received all the care and attention that the exigencies of the case required till five days afterward, when she died in consequence of the wound received. On the sixth day the coroner held an inquest, and in this, an action to recover for his services against the county, it was *held* he could recover.

[4] County of Lancaster *v.* Mishler, 100 Pa. St., 624. In this, a suit by the coroner against the county to recover his fees, it was *held* that this presumption was not conclusive, and evidence was admissible to show that he acted in bad faith and knowingly without sufficient cause or reason.

have been suddenly killed by the same violent cause, under circumstances proper to be inquired of by a coroner's inquest, it is proper and necessary for the coroner, acting in good faith, to hold a separate inquest over each body.[1] A coroner's inquest is a judicial investigation. The coroner cannot delegate his authority to any one. Neither can he appoint a deputy under the common law. He must act in person as any other judicial officer; and it may safely be said that a coroner has no power to appoint a deputy coroner, except where special provision is made therefor by statute.[2] In England, a coroner's court is a court of record, and it has accordingly been held that trespass cannot be maintained for turning a person out of a room where the coroner is about to take an inquisition.[3] But in this country it may safely be said that a coroner's court is not one of record, but of inferior jurisdiction.[4] The functions of a coroner are judicial in their character;[5] so judicial that he is protected under the principles which protect judicial officers from responsibility for their official acts in a civil action brought by a private person. Records of his proceedings amount to entries concerning matters of public interest, made under the sanction of an official oath, and in compliance or presumed compliance of the law.[6]

The Court said: "The duty of a coroner to hold an inquest rests on sound reason, on that reason which is the life of the law. It is not a power to be exercised capriciously and arbitrarily against all reason. The object of an inquest is to seek information, and obtain and secure evidence, in case of death by violence or other undue means. If there be reasonable ground to suspect it was so caused, it becomes the duty of the coroner to act. If he has no grounds for suspecting that the death was not a natural one, it is a perversion of the whole spirit of the law to compel the county to pay for such services."

[1] County of Fayette *v.* Batton, 108 Pa. St., 591. It appeared in this case, that nineteen persons came to their death suddenly and almost simultaneously by an explosion of fire-damp in a coal-mine. The coroner held a separate inquest over each body at the respective homes of the deceased, qualifying the same jury separately over each body, and the inquest returned a separate finding in each case. It was *held* that this was the necessary and proper course to pursue under the circumstances, and that the coroner was entitled to the legal fees in each case. In Boislinieu *v.* Board of Co. Commissioners, 32 Mo., 375, it was *held* that the coroner is the sole judge as to the propriety or necessity of holding the inquest, and his action in that respect is not subject to revision by the county commissioners, and he is entitled to fees under the statute notwithstanding the verdict of the coroner's jury discloses that the deceased died of a natural death, and not by casualty or violence.

[2] Am. & Eng. Enc. of Law, vol. 4, p. 175; 2d ed., vol. 7, p. 603, note 6.

[3] Garnett *v.* Ferrand, 6 Barn. & Cress., 611.

[4] People *v.* Fitzgerald, 43 Hun (N. Y.), 46.

[5] Otherwise by statute; *cf.* Germania Life Ins. Co. *v.* Ross-Lewin, 51 Pac. Rep. (Col.), 488.

[6] People *v.* Devine, 44 Cal., 452; Commonwealth *v.* Hawkins, 3 Gray

Of His Authority to Hold an Inquest.

His authority to hold an inquest is not confined to the body of a person who may have died within his territorial jurisdiction, but extends to all bodies brought within his jurisdiction, no matter where death may have taken place.[1] So in any case where, after burial, an inquest becomes necessary to determine the manner of the death of a person who, dying in one, is buried in another county, the coroner of the latter county is the proper officer to hold the inquest.[2] A coroner cannot hold a second inquest. As we have seen, in holding an inquest the coroner performs a judicial duty, which is *functus officio*, discharged once for all, as soon as the verdict has been returned. He can hold no second inquest in the same case unless the first has been quashed by a court of competent jurisdiction, and a new inquiry ordered. He cannot set aside or quash his own inquest. If he were allowed to hold two inquests, not only might the greatest inconvenience arise from the inconsistent findings of the respective juries, but such a practice would be liable to great abuse, and as the object of the proceeding is merely preliminary, the main purpose being to ascertain whether it is probable that a crime has been committed, and to examine the facts and circumstances and preserve the evidence, all the ends of this inquiry are answered by one inquisition, *super visum corporis*. We believe no reported case is to be found in this country where a second inquisition has been held, the first remaining undischarged, nor is any such practice known to or recognized by our laws.[3]

The Inquest must be Held upon View of the Body.—The coroner can in no case hold an inquest except upon view of the body.

(Mass.), 463; U. S. Life Ins. Co. *v.* Kielgast, 129 Ill., 557; but see Chicago, M. & St. P. R'y Co. *v.* Staff, 46 Ill. App., 499; L. S. & M. S. R'y Co. *v.* Taylor, *id.*, 506; Mutual Life Ins. Co. *v.* Schmidt, 6 Ohio Dec., 901.

[1] People *v.* Fitzgerald, 105 N. Y., 146.

[2] Jameson *v.* Board of Commrs., 64 Ind., 524.

[3] Regina *v.* White, 3 Ellis & Ellis (Eng.), 137. In this case a second inquisition found by a coroner's jury was quashed by the Court upon application of the defendants, who were charged therein with wilful murder. In People *v.* Budge, 4 Park Crim. Rep. (N. Y.), 519, a coroner's jury found that the death was caused by suicide, and nearly four months afterward the coroner summoned another jury and held a second inquest, at which the jury found that the deceased was killed by another, whereupon the coroner issued a warrant of commitment under which the accused was imprisoned, but on *habeas corpus* he was discharged from imprisonment on the ground that the second inquisition was unauthorized.

This is jurisdictional and cannot be waived by any one. He is not bound to hold an inquest before burial of the body takes place. When it has been buried, and he believes an inquest necessary, he is vested with authority to have the body disinterred and hold his inquest, and if necessary direct a post-mortem examination to be made, but after having done so, he must cause it to be reburied.[1] Deep interests are involved in the proper discharge of the duties of coroners; the character, liberty, and perhaps the life of a citizen accused of crime on the one hand, and on the other the aiding of public justice in establishing the guilt and securing the punishment of the actual criminal. Many of the questions which fall within the scope of a coroner's inquisition are of an intricate and most perplexing character, a correct solution of which can only be arrived at by minds the best instructed and habituated to their investigation. In many cases some of these questions can be satisfactorily settled by the evidence of persons having cognizance more or less direct of the facts; in others, however, they can only be solved by the facts deduced from pathological anatomy, and other circumstances connected with the dead body, the cause of the extinction of life in which is the subject of the inquest. Perhaps few elective coroners are well qualified to deal with these matters, according to present-day scientific standards.

In Massachusetts Office of Coroner Abolished.—Indeed, in Massachusetts the office of coroner was abolished in 1877, and the governor was invested with power, and it is his duty, to appoint, by and with the advice and consent of the council, able and discreet men, learned in the science of medicine, to be medical examiners, whose duties are to make examinations as provided in the statute upon the view of the dead bodies of such persons only as are supposed to have come to their death by violence[2] (see below, page 818).

Movement toward Abolition of Coroners in New York.—The Constitution of New York State, as amended 1894, permits the legislature to abolish the office of coroner; it is no longer a constitutional office. The office was abolished in Erie County in 1902[3] and medical examiners (physicians) substituted. The holding of

[1] The King *v.* Ferrand, 3 Barn. & Ald. (Eng.), 260; 2 Hawk P. C., 77.

[2] Mass. R. L. (1902), chap. 24, secs. 1, 9.

[3] N. Y. Laws of 1902, chap. 577.

inquests only when crime is suspected, and under advice of such examiners, themselves experts, is doubtless more economical and efficient than the holding of inquests in all cases of sudden or violent death by elective coroners, who must often employ professional skill. Further abolition of the ancient office is likely.

Coroner may Employ Professional Skill.—A thorough examination aided by professional skill is in general absolutely necessary to the proper administration of justice. It would no doubt be strange if a coroner had not authority to pledge the responsibility of the county for the compensation of all auxiliary services which are necessary to the proper execution of his office, and which he can by no other means command; for instance, when his duty requires him to disinter a body, he cannot be expected to do it with his own hands, or by hands paid for with his means. Indeed, it has been said that, in this enlightened age, a coroner who would consign to the grave the body over which he had held an inquest, without availing himself of the lights which the medical science has placed within his reach, would in most cases fall short of what his official duty requires.[1] It is the generally accepted view of the law now that it is the duty of a coroner holding an inquest *super visum corporis* to avail himself of professional skill and aid, and his contract will bind the county to the payment of a reasonable compensation for making a post-mortem examination.[2]

[1] County of Northampton *v.* Innes, 2 Carey (Pa.), 156; Commonwealth *v.* Hannan, 4 Barr (Pa.), 269.

[2] Allegany County *v.* Watts, 3 Barr (Pa.), 462; Van Hoevenbergh *v.* Hasbrouck, 45 Barb. (N. Y.), 197. St. Francis Co. *v.* Cummings, 55 Ark., 419; Gaston *v.* Marion Co. Comm'rs., 3 Ind., 497. The New York legislature has made provision making the physician's services in such a case a charge against the county and the physician must look to the county for his pay. Cosford *v.* Board of Supervisors, 38 N. Y. St. Rep., 964; 15 N. Y. Supp., 680. In Pennsylvania a physician or surgeon, employed by the coroner to make a post-mortem examination, may recover from the county a reasonable compensation for his services; and the county commissioners have no power to appoint a surgeon to perform such services, so as to preclude the coroner from selecting a proper person, in the exercise of his discretion. County of Allegany *v.* Shaw, 34 Pa. St., 301. It has been held that the authority of a coroner to employ a chemist to discover whether poison caused the death of one on whose body he holds an inquest does not restrict him to the employment of a resident of the county, and that the analysis of the chemist need not be made in the county of the coroner, and that even though the latter was, by corrupt appliances of others, induced to employ a chemist, it is no defence to a suit by the chemist to recover compensation for his services. Board of Commissioners *v.* Jameson, 86 Ind., 154.

In New York he is empowered by statute to employ not more than two competent surgeons to make post-mortem examinations and dissections

Post-Mortem Examination.

Whether such examination should take place before the coroner has empanelled a jury seems to be an open question. We would venture the opinion that it should not, inasmuch as the jury ought to see and view the body in the same condition, as near as may be, as it was when found, and not after it has been mutilated, as it must needs be by a post-mortem examination. It is, however, settled that the post mortem should not be in the presence of the jury, and that they are to be instructed by the testimony of the physicians who are designated by the coroner to make the examination.[1] The coroner's right to dissect the dead body of a human being does not extend to all cases. Such a power could be wielded with the most injurious effects upon a community. His power to dissect is confined to those cases where he is authorized by law to hold an inquest upon the body. But a post-mortem examination, conducted by surgeons employed by a coroner holding an inquest, is not a part of the inquest in such a sense as that every citizen has a right freely to attend it. At common law it was essential to the validity of a coroner's inquisition that the jury should view the body. And so is our law. But it was never required that the body should be dissected in any case. It is discretionary with the coroner to cause a dissection to be made, and to select the surgeons. He has also a discretion to determine whether any person, and what persons, may be present besides the surgeons. Not even the jurors have a right to witness the examination. They are to be informed of what it discloses by the testimony of the surgeons. Indeed, no person has a right to be present at the post-mortem examination

and to testify to the same. N. Y. Laws of 1874, chap. 535, sec. 2.

[1] People *v.* Fitzgerald, 105 N. Y., 146. In this case, upon application of the defendant and upon affidavits showing sufficient reasons therefor, a coroner of Chemung County, N. Y., directed the exhumation of the body of a man, who died in California about one year previous and was buried in Chemung County, for the purpose of a post-mortem examination to determine whether the deceased was murdered, and the body was accordingly exhumed, and an examination had without empanelling a jury. An indictment was found against the defendant charging her with body-stealing under sec. 311 of the New York Penal Code, against body-stealing. It was *held* that, conceding the proceeding to have been irregular, a conviction under that provision of the Penal Code could not be sustained, and this, without regard to the motives which actuated the defendant; that if she had committed any offence it was not that of body-stealing.

upon the ground that he is suspected of having caused the death. He loses no legal right by being excluded. He has no right to dissect the body. If the coroner's jury pronounce him guilty, the inquest, like the indictment of a grand jury, simply makes him liable to arrest.[1]

Massachusetts Statutory Provisions.

The statute law of Massachusetts has already been referred to. It has abolished the office of coroner and in its place put medical examiners, so called, who are presumed to be learned in the science of medicine. Their powers, however, are not co-extensive with those of coroners. A medical examiner cannot hold an inquest. He cannot hold an autopsy without being thereto authorized in writing by the district attorney, mayor, or selectmen of the district, city, or town where a dead body lies. He can only, upon receiving notice that there has been found, or is lying within the county, the dead body of a person who is supposed to have come to his death by violence, repair to the place where such body lies, view and take charge of the same. If he deems a further examination necessary, and is authorized so to do, he must make an autopsy in the presence of two or more discreet persons, whose attendance he may compel by subpœna if necessary, and he must then carefully reduce or cause to be reduced to writing every fact and circumstance tending to show the condition of the body and the cause and manner of death, together with the names and addresses of the witnesses. If he deems it necessary, he may employ a chemist to aid in the examination of the body or of substances supposed to have caused or contributed to the death,[2] the record of which he must subscribe.[3] Such an autopsy does not, however, upon the trial of an accused, render

[1] Crisfield *v.* Perine, 15 Hun, 200, affirmed 81 N. Y., 622. This was an action of assault and battery and it appeared that the defendant was a coroner, and that he held an inquest on the dead body of a man who died after receiving personal injuries in an affray which he had with his nephew. A post-mortem examination was about to be made by two surgeons employed by the coroner for that purpose. The plaintiff, who was also a physician and surgeon, was in the room when the examination was about to be entered upon and said that he wished to remain and witness it, but the coroner asked him to leave, and on his refusing caused him to be put out of the room. For this act this suit was brought. It was *held* that the suit could not be maintained.

[2] Mass. R. L. (1902), chap. 24, § 19.

[3] *Ib.*, chap. 24. § 9.

other competent evidence, as to the condition and appearance of the dead body at the time of the autopsy, inadmissible.[1] The autopsy may be followed by an inquest held, not by the examiner, but by a justice of the district, police, or municipal court for the district or city in which the body lies, or a trial justice. One of these functionaries must hold an inquest upon being notified by a medical examiner that in his opinion a death was caused by violence, and after hearing the testimony draw up and sign a report and issue process for apprehension of a person charged by the report with the commission of an offence, if he is not in custody.[2] Even though a medical examiner reports that a death was not caused by violence, if the district attorney or the attorney-general is of a contrary opinion, either one may, notwithstanding such report, direct an inquest to be held in accordance with the provisions of the statute.[3]

New York Statutory Provisions.[4]

In New York the powers and duties of coroners are defined by statute. Coroners in the boroughs of the city of New York are governed by the charter of that city. For the State at large it is provided that whenever a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or that he has committed suicide, he must go to the place where the person is, and forthwith inquire into the cause of the death or wounding, and summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, if such death or wounding be of a criminal nature, to appear before him forthwith at a specified place, to inquire into the cause of death or wound, and if it appears from the evidence taken or during the inquisition that any person or persons are chargeable with the killing or wounding, or that there is probable cause to believe that any person or persons are chargeable therewith, and if they are not in custody, the coroner must forth-

[1] Commonwealth *v.* Dunan, 128 Mass., 422.

[2] Mass. R. L. (1902), chap. 24, §§ 10, 11, 15.

[3] *Ib.*, chap. 24, § 18.

[4] For a similar statute to Mass. statute in effect in Erie County, N. Y., only, see N. Y. Laws of 1902, chap. 577.

with issue a warrant for the arrest of the person or persons charged with such killing or wounding, who must be arraigned before the coroner for examination, and the coroner has power to commit the person or persons so arrested to await the result of the inquisition. A coroner is disqualified from acting as such in any case where the person killed or dangerously wounded is a co-employee with the coroner of any person or persons, association or corporation, or where it appears that the killing or wounding has been occasioned, directly or indirectly, by the employer of the coroner.[1] It is further provided that whenever a convict shall die in any state prison, it shall be the duty of the inspector having charge of the prison and of the warden, physician, and chaplain of the prison, if they or either of them shall have reason to believe that the death of the convict arose from any other than ordinary sickness, to call upon the coroner having jurisdiction to hold an inquest upon the body of such deceased convict.[2]

II. THE JURY AND INQUEST.

Jurors Must be Sworn by Coroner.—The jurors summoned by a coroner to attend an inquest must be from the county or jurisdiction wherein the coroner is empowered to act. He cannot proceed with the inquest until he has summoned and sworn the jury. The jurors are not challengeable, and therefore they should be carefully selected and sworn by the coroner himself. His duties are judicial and he can only take an inquest *super visum corporis*, and an inquest in which the jury is not sworn by himself is absolutely void and of no effect.[3]

They Must Investigate and Determine the Facts.—After being sworn by the coroner they must investigate and determine and are the sole arbiters of the facts; the coroner's duty being to instruct them in the law. They must go, view, and examine the body together, and not separately. It is essential to the validity of the inquest that the jury should view the body.[4]

Coroner may Compel Attendance of Witnesses.—When the coroner sits to hold an inquest, he sits as a judicial officer, armed

[1] N. Y. Criminal Code, § 773.
[2] N. Y. Revised Statutes, part iv., chap. iii., § 102.
[3] 2 Hawk P. C., 77; King *v.* Ferrand, 3 Barn. & A. (Eng.), 260. People *v.* Coombs, 158 N. Y., 532, aff'g. 36 App. Div., 284.
[4] Rex *v.* Ferrand, 3 B. & Ald., 260.

with all the ordinary powers possessed by judicial officers. He may compel the attendance of jurors, whose qualifications are usually such as are required of jurors in a court of record. It is his duty to present before the jury all the material testimony within his power, touching the death as to the manner whereof the jury are to certify, and that which makes for as well as against the party accused. It is his duty to summon before his inquest every person whom he has any reason to believe possesses any knowledge relative to the death which he is investigating. He is to summon such persons to attend before him for examination. He has full authority to compel obedience to his subpœnas. He has this power by the common law.[1] If a post-mortem examination is made, the examining surgeons should testify before the jury as to the matters disclosed by the examination.[2] The witnesses produced must be sworn by the coroner, and their testimony reduced to writing by him or under his direction.

Rights of Accused Party.

The coroner is not required to take the testimony of the witnesses who are examined before the jury in the presence of the party accused. The accused has not the right to be represented by counsel, or to cross-examine the witnesses.[3] He is not permitted to produce witnesses before the coroner to show himself innocent of the crime. The coroner is not required to examine any witnesses to establish the guilt of such party when brought before him by virtue of process issued after the finding of the inquisition.[4]

Deliberation by Jury and Return of an Inquisition.

After the evidence has been taken, and the jury instructed in the law by the coroner, the jury should retire to deliberate upon their verdict. During such deliberation and until they have arrived at their verdict the coroner should not be present in the

[1] *In re* Coroners, 11 Phila. (Pa.), 387.

[2] Crisfield *v.* Perine, 15 Hun, 200, affirmed 81 N. Y., 622.

[3] 2 Hawk P. C., 77.

[4] Matter of Collins, 11 Abb. Pr. (N. Y.), 406; 20 How. Pr., 111. In this case it was held that a commitment issued by a coroner against a person charged with murder is not void for the omission of the allegation that he caused the death "feloniously," if it is such that the fact that he caused the death feloniously may be collected on its face. And see People *v.* Beigler, 3 Park Crim. Rep. (N. Y.), 316.

room where the jury is deliberating. After they have agreed on their verdict it should be reduced to writing, and the coroner is bound to accept it as final in his court. The inquisition should then be signed by the coroner and jury.[1] If the inquest is signed by the coroner and duly certified by him, the jurors having signed by making their cross marks, and the whole being certified by the coroner, his certificate of the signatures of the jurors is sufficient and the inquisition is properly made.[2] If several jurors on the inquest have the same Christian and surname, it is not necessary in the caption of the inquisition to distinguish them by abode or otherwise.[3] The law requiring the coroner to make a return of the testimony with the inquisition cannot be satisfied short of some official certificate indicating that the witnesses named were sworn before him, to the matter to be offered as evidence against a prisoner. At least if there be no formal authentication, there should be proof *aliunde* that the memorandum presents the testimony of the witness truly.[4]

New York Statutory Provisions.

The New York Criminal Code provides that when six or more of the jurors appear, they must be sworn by the coroner to inquire who the person was, and when, where, and by what means he came to his death or was wounded, as the case may be, and into the circumstances attending the death or wounding, and to render a true verdict thereon according to the evidence offered to them or arising from the inspection of the body.[5] The coroner may issue subpœnas for, and summon and examine as witnesses, every person who in his opinion, or that of any of the jury, has any knowledge of the facts; and he must summon as a witness a surgeon or physician, who must, in the presence of the jury, inspect the body, and give a professional opinion as to the cause of the death or wounding.[6] The coroner has power to compel the attendance of a witness and to testify, and he may punish a witness for disobedience, as upon a subpœna issued by a magistrate.[7] The jury, after inspecting the body and hearing the tes-

[1] Rex *v.* Bowen, 6 Car. & P., 602; Rex *v.* Bennett, 6 Car. & P., 179.
[2] State *v.* Evans, 27 La. An., 297.
[3] Rex *v.* Nicholas, 7 Carr & Payne (Eng.), 538.
[4] People *v.* White, 22 Wend. (N. Y.), 167.
[5] N. Y. Code Crim. Proc., § 774.
[6] *Ib.*, § 775.
[7] *Ib.*, § 776.

timony, must render their verdict, and certify it by an inquisition in writing, signed by them, and setting forth who the person killed or wounded is, and when, where, and by what means he came to his death or was wounded, and if he were killed or wounded, or his death were occasioned by the act of another by criminal means, who is guilty thereof, in so far as by such inquisition they have been able to ascertain.[1] The testimony of the witnesses examined before the coroner's jury must be reduced to writing by the coroner, or under his direction, and must be forthwith filed by him, with the inquisition, in the office of the clerk of the court of sessions of the county, or of a city court having power to inquire into the offence by the intervention of a grand jury.[2]

If, however, the defendant be arrested before the inquisition can be filed, the coroner must deliver it with the testimony to the magistrate before whom the defendant is brought.[3] If the jury find that the person was killed or wounded by another under circumstances not excusable or justifiable by law, or that his death was occasioned by the act of another by criminal means, and the party committing the act be ascertained by the inquisition and is not in custody, the coroner must issue a warrant signed by him with his name of office, for the arrest of the person charged.[4] The coroner's warrant may be served in any county; and the officer serving it must proceed thereon, in all respects, as upon a warrant of arrest on an information, except that when served in another county it need not be indorsed by a magistrate of that county.[5] When the defendant is brought before the coroner, he must proceed to examine the charge contained in the inquisition or information, and hold the defendant to answer, or discharge him therefrom, in all respects as upon a warrant of arrest on an information.[6]

III. THE EFFECT OF THE EVIDENCE AND VERDICT.

Under the common law formerly, a coroner's inquisition was equivalent to an indictment by a grand jury upon which the accused might be tried. But in this country no person can be tried upon a coroner's inquisition, yet the inquisition of a coro-

[1] *Ib.*, § 777.
[2] *Ib.*, § 778.
[3] *Ib.*, § 779.
[4] *Ib.*, § 780.
[5] *Ib.*, §§ 782.
[6] *Ib.*, § 783.

ner's jury finding a person guilty of murder has about the same force against him, until the grand jury passes upon his case, that an indictment found by them has thereafter, prior to his trial.

Coroner has Power to Issue Process of Apprehension.—If a person is charged with the crime in the inquisition, the coroner has power and he issues his process for the apprehension of the accused when not in custody solely upon the inquisition. The inquisition, though taken in the absence of the prisoner, and upon the testimony of witnesses he could not cross-examine, settles the question of his guilt until the grand jury passes upon the case. It justifies the commitment of the prisoner to jail, in the same manner that the testimony of witnesses does taken before a justice of the peace. The coroner can only examine the prisoner in the same manner as upon a warrant of arrest or on information, and is not authorized to examine witnesses either against the prisoner or for him, when he is apprehended by virtue of process issued subsequent to the finding of the inquisition by the jury, or in custody of the coroner without process at the time the same is found.

Privilege of Prisoner after Arrest.—The prisoner (as already stated, page 821) has the privilege of telling his own story before the coroner, which is to be returned with the inquisition, and that is all. He cannot be discharged on it, however plausible it may be; and he has not the privilege of proving it true before the coroner. He should, therefore, not be discharged, and he cannot have the case investigated again before it is passed upon by the grand jury.[1]

Under the provisions of the New York Criminal Code the defendant against whom an inquisition has been found by a coroner's jury is entitled to a hearing before a magistrate, whether he has been arrested before the inquisition has been filed or is arrested after such filing. Under the provisions of sec. 779, in the case of a defendant who has been arrested before the inquisition can be filed, the prisoner is entitled to be examined before the magistrate, before whom he may be brought, as provided in sec. 781, and in the case of a prisoner who has not been arrested until after the inquisition was filed, under secs. 781 and 783 the defendant is entitled to be heard before a magistrate in all respects as upon a warrant of arrest on an information. The magistrate

[1] Matter of Collins, 11 Abb. Pr. (N.Y.), 406; 20 How. Pr., 111.

must proceed to examine the charge contained in the inquisition, and hold the defendant to answer or discharge him therefrom.[1] The information is the allegation made to a magistrate that a person has been guilty of some designated crime.[2]

When Evidence taken before Coroner of a Party Charged with Crime is Admissible in Evidence upon His Trial Subsequently.

There is nothing which distinguishes between the proceedings of a coroner's inquest and any other official proceedings taken and returned in the discharge of official duty as to their admissibility in evidence. A witness, therefore, may be contradicted by the production of a deposition thus given by him before a coroner.[3] But the line is sharply drawn in what cases the testimony of a witness examined before a coroner's inquest can be used on his subsequent trial, and in what cases it cannot. When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with the crime, and a witness is called and sworn before the coroner's jury, the testimony of that witness, should he afterward be charged with the crime, may be used against him on his trial, and the mere fact that at the time of his examination he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness, whose testimony may be afterward given in evidence against himself. If he desires to protect himself he must claim his privilege. But if, at the time of his examination, it appears that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as a party accused, called before a tribunal vested with power to investigate preliminarily the question of his guilt, and he is to be treated in the same manner as if brought before a committing magistrate, and an examination not taken in conformity with the statute cannot be used against him on his trial

[1] Matter of Ramscar, 10 Abb. N. C. (N. Y.), 442. The prisoner in this case was detained on a commitment issued by a coroner, he not having had an examination, and the Court directed an examination before a magistrate.

[2] N. Y. Code Crim. Pr., § 145.

[3] People *v.* Devine, 44 Cal., 452; Commonwealth *v.* Hawkins, 3 Gray (Mass.), 463.

for the offence.[1] So the doctrine as to silence being taken as an implied admission of the truth of allegations spoken or uttered in the presence of a person, does not apply to silence at a judicial proceeding or hearing, and since the proceedings at a coroner's inquest are of a judicial character, what there transpired must be considered as a part of the proceedings.[2] The leading cases which have been before the New York Court of Appeals upon this important question, and from which that court has finally deduced the above rules, may be here referred to.

Hendrickson Case.—In the first case the wife of the defendant died suddenly in the morning, and in the evening of the same day a coroner's inquest was held. The defendant was called and sworn as a witness upon the inquest. At that time it did not appear that any crime had been committed, or that the defendant had been charged with any crime, or even suspected, except so far as the nature of some of the questions asked of him might indicate such a suspicion. On his subsequent trial on an indictment for the murder of his wife, the statements made by him at the coroner's inquest were held admissible, on the ground that he was not examined as a party charged with the crime; that it had not appeared even that a crime had been committed, and that he had simply testified as a witness on the inquiry as to the cause of the death.[3]

[1] People *v.* Mondon, 103 N. Y., 211.

[2] People *v.* Willett, 92 N. Y., 29. In this case, upon the trial of an indictment for murder, evidence was received on the part of the prosecution, under objection and exception, to the effect that upon the coroner's inquest a witness testified that shortly after the murder a stranger called at her house and asked the way to Sandy Hill, and also for a drink of water; that the prisoner with a number of others was placed around a room, and the witness pointed out the prisoner as the one who so called; also that a number of persons, including the prisoner, passed behind her, each one repeating the question asked her by the stranger, and she identified the prisoner by his voice, and that the prisoner on that occasion did not deny that he was such stranger. It was held that the prisoner was not bound to speak and his silence could not be regarded as an evidence of guilt, and that the evidence was improperly received. The Court said: "The question whether the defendant was bound to speak, and understood that he was at liberty to speak, if he chose, was submitted to the jury by the Court in his charge, and an exception taken thereto. The doctrine as to silence being taken as an implied admission of the truth of allegations spoken or uttered in the presence of a person, does not apply to silence at a judicial proceeding or hearing. And if the proceedings before the coroner were of a judicial character the evidence was erroneously received. It is very apparent that the examination before the coroner partook of a judicial character, and what then transpired must be considered as a part of the proceedings; the coroner was there, a jury had been empanelled, and witnesses were examined whose testimony was returned as a portion of the coroner's proceedings. It is difficult to see upon what ground it can be claimed that the experiments which were made were not in connection with the proceedings before the coroner and a part thereof."

[3] Hendrickson *v.* People, 10 N. Y., 13.

McMahon Case.—Following this came the *McMahon Case*, in which it appeared that the defendant was arrested by a constable, without warrant, on a charge of having murdered his wife. The constable took him before the coroner, who was holding an inquest on the body, by whom he was sworn and examined as a witness. It was held that the evidence thus given was not admissible on the prisoner's trial for the murder, and his conviction was reversed upon that ground.[1]

Teachout Case.—The doctrine of this case was more clearly defined and somewhat limited in a later case, the *Teachout Case*. In that case the defendant appeared at the coroner's inquest in pursuance of a subpœna to testify, and voluntarily attended; he was not under arrest, but was informed by some one that it was charged that his wife had been poisoned and that he would be arrested for the crime. Before he was sworn he was informed by the coroner that there were rumors that his wife came to her death by foul means and that some of those rumors implicated him, and that he was not obliged to testify unless he chose. He said he had no objection to telling all he knew. The Court in delivering its opinion preludes it by a reference to these facts as showing that the statements made were voluntary in every legal sense, and held that a mere consciousness of being suspected of a crime did not so disqualify him that his testimony, in other respects freely and voluntarily given before the coroner, could not be used against him on his trial on a charge subsequently made of such crime. On that ground it held the evidence properly admitted, at the same time referring with approval to the *McMahon Case*, and distinctly limiting the rule of exclusion to cases within its bounds.[2]

Mondon Case.—Then followed the *Mondon Case*, where, on the finding of the body of the deceased, the defendant was arrested without warrant as the suspected murderer. While he was thus in custody the coroner empanelled a jury and held an inquest, and the defendant was called as a witness before the inquest and was examined by the district attorney and by the coroner. The prisoner was an ignorant Italian laborer unfamiliar with the English language. He was unattended by counsel, and it did not appear that he was in any manner informed of his rights, or that he was not bound to answer questions tending to criminate him. He was twice examined; on the first occasion the examination was taken by questions put either by the district attorney or by the coroner, and the result written down by the coroner, who then read the evidence over to him, line by line, and asked him if he understood it and if it was the truth, and he said it was, and the coroner then reswore him to the deposition. The coroner, after taking the defendant's testimony on the first day, came to the conclusion that the defendant did not understand English well enough to be examined,

[1] People *v.* McMahon, 15 N. Y., 384.

[2] Teachout *v.* People, 41 N. Y., 7.

and that it ought to be taken through an interpreter, which was done, in order that they might get it a little better and a little fuller. It was held that the defendant's testimony was not admissible upon his trial on the indictment.[1] It will be seen that this later case follows in direct line with the rule announced in the *McMahon Case* and clearly distinguishes another case, the *McGloin Case*, upon the authority of which the trial court held the testimony of the prisoner in the *Mondon Case* admissible.

McGloin Case.—The case of *McGloin* was not that of the examination of a prisoner on oath before a magistrate before whom he was taken involuntarily, while in custody, and interrogated by the magistrate, who to all appearance had power to require him to answer, but while under arrest the prisoner said to the inspector of police who had him in charge that he would make a statement. The inspector then said that he would send for a coroner to take it. The coroner was then sent for and came to police headquarters and took down in writing the confession dictated by the prisoner, the coroner asking no questions and not acting in any official capacity, but as a mere amanuensis to take down the confession and prove the contents. It was held that the confession of the prisoner was admissible in evidence upon his trial for murder.[2]

Molineux Case.—The defendant's statements made at the coroner's inquest, before he had been accused of the murder, were held admissible, even though the coroner threatened to punish him for contempt unless he obeyed the subpœna.[3]

The decisions in other States are, with few exceptions, substantially in harmony with the New York decisions.

Rule in Pennsylvania.—The rule in Pennsylvania is substantially that testimony given by the prisoner under oath before a coroner's inquest, previous to his being charged or suspected of the murder of the individual upon whose body the inquest was sitting, may afterward be given in evidence against him, on his trial for the murder of such person.[4]

[1] People *v.* Mondon, 103 N. Y., 211.

[2] People *v.* McGloin, 91 N. Y., 241.

[3] People *v.* Molineux, 168 N. Y., 264.

[4] Williams *v.* Commonwealth, 29 Pa. St., 102. In this case the prosecution was permitted to prove upon the trial that a justice of the peace had held an inquest on the body of a dead person, and appointed another person foreman of the inquest, and directed him to swear witnesses; and while the inquest was still sitting, the foreman called upon and requested the defendant to be sworn and give evidence as a witness, and he was duly sworn and was examined by the foreman, in presence of the inquest. It was held on appeal that his evidence was admissible. On this point the Court said: "If the defendant had been awakened out of sleep, charged with crime, and then, in the necessary confusion of his faculties sworn to testify, I should have stead-

Rule in Nebraska.—The statements of a prisoner to be competent evidence must have been voluntarily made. In cases of declaration made on an examination before a coroner's inquest by a person under arrest or charged with the crime and also under oath, they are not admissible. But when the person, although he be subsequently charged with the offence, appears voluntarily and gives testimony, before any accusation has been made against him, his statements are admissible in evidence against him on the trial of an indictment for the crime.[1]

Rule in Alabama.—The rule in Alabama is the same as in Nebraska.[2]

Rule in Georgia.—The rule in Georgia is substantially the same. Whether defendant has been accused is of "secondary" importance.[3]

Rule in Illinois.—In Illinois evidence of statements made by the accused under oath before a coroner's jury, even though he was already suspected of the crime, were held admissible against him on his trial, when they were made voluntarily and not contradicted by him on his trial.[4]

Rule in Indiana.—The rule in Indiana is substantially the same as in Pennsylvania.[5]

Rule in Maine.—The rule in Maine resembles the Illinois rule.[6]

Rule in Missouri.—Statements made by the defendant before the coroner are presumed to be voluntary, and unless shown otherwise are admissible against him in any case.[7]

Rule in South Carolina.—The rule in South Carolina resembles that in Nebraska.[8]

fastly resisted the subsequent introduction of the testimony against him. The common law, which justifies an accused man in entire silence, appears in beautiful contrast to the continental systems, which permit the criminal to be racked by inquisitorial skill, until something be wrung from him which may be patched up into proof of guilt. This case shows nothing of the kind. The phrase 'called up' commented on by the counsel, does not appear in the record, and if employed by the witnesses related doubtless to the ordinary case of calling forth a witness, and not awakening him from slumber. When the defendant was sworn before the inquest, he had neither been charged with nor suspected of crime. He might have declined to testify, and this would have pointed suspicion directly to him. He took the risk of a statement, and cannot complain that he met the legitimate consequences of the act. In the eye of all the authorities, it was a voluntary statement."

[1] Clough *v.* The State, 7 Neb., 320.

[2] Wilson *v.* State, 110 Ala., 1.

[3] Woolfolk *v.* State, 81 Ga., 551.

[4] Lyons *v.* People, 137 Ill., 602.

[5] Epps *v.* State, 102 Ind., 539; Davidson *v.* State, 135 Ind., 254.

[6] State *v.* Gilman, 51 Me., 206.

[7] State *v.* David, 131 Mo., 380.

[8] State *v.* Vaigneur, 5 Rich. Law (S. C.), 391.

Rule in Texas.—The rule in Texas resembles that in Nebraska.[1]

Rule in West Virginia.—The West Virginia courts lay stress on whether the defendant has been accused when he testifies before the coroner, as in Nebraska.[2]

Rule in Wisconsin.—The Wisconsin courts have followed the New York cases.[3]

[1] Wood *v.* State, 22 Tex. App., 431.
[2] State *v.* Hobbs, 37 W. Va., 812.
[3] Dickerson *v.* State, 48 Wis., 288; Emery *v* State, 92 Wis., 146.

MEDICO-LEGAL AUTOPSIES.

BY

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AUTOPSIES.

A MEDICAL examiner before proceeding with an autopsy, especially if called before the body has been removed from the place where it was found, should carefully note certain facts. These should be entered by himself or an assistant with great care, in a note-book, as this book can be introduced as evidence in any trial. A satisfactory way is to dictate to the assistant as the examination proceeds, and at the conclusion the assistant reads the notes taken, and the examiner verifies them.

SURROUNDING OBJECTS—POSITION OF THE BODY.

These should be first noted. The character of the soil; the condition of the ground, and whether it shows footprints; if so, their direction; the evidence of any struggle; the presence of any weapon; and finally, the exact position in which the body lies, especially the position of the hands and feet. This is important, for the body may be found in a position which the deceased could not have assumed on the supposition of the wound or injury having been accidental or homicidal. If possible a photograph should be taken of the body in the exact position in which it is found. If it is absolutely necessary to remove the body, it should be done with great care, keeping the body in as horizontal a position as possible.

The character of the surrounding soil should be noted. This is of special importance when the body to be examined has been exhumed: for the question of preservation of the body and the ability to recognize pathological changes may be brought up at a trial. This was an important point raised in the Buchanan case (New York, 1893).

If a body be found in the water, examine the character of the water and the temperature, and if found near the shore, the character of shore and bottom.

Blood.—The situation of blood-stains, and their number and extent, on clothing or surrounding objects should be noted.

This will often show whether a struggle has taken place after receiving the fatal wound, and is also of medico-legal importance if made at the time the body is found, for it may be so situated as to show that the body has been interfered with after death.

Again, spots of blood found upon articles of clothing or upon surrounding objects should be noted as to their form and direction, for they may serve to furnish an indication of the position of the person with respect to them when the wound was inflicted. For example, if the spot was oval, the presumption is that the person was placed obliquely with respect to the stain while the hemorrhage was occurring. The force with which the blood was thrown out will in some measure be indicated by the obliquity or length of the spot. The amount of blood will also often indicate whether the person has died suddenly, the exact spot where death occurred, whether a struggle took place, and will also preclude the possibility of a person moving after receiving the fatal injury. When we examine a body, especially when found in a room, care must be taken not to be misled by the accidental diffusion of blood by persons going in and out, or touching the body (see BLOOD-STAINS, Vol. II.).

Clothing.—The examination of the clothing should be thorough. A description of each article should be noted, and the order in which it is removed; for often it is important to prove that the garments were worn by or belonged to the deceased. If any blood is on the clothing, note whether the blood is in large patches, or whether it is sprinkled over the garment: the amount of the blood and what garments are stained by it. Note and examine whether the blood has flowed down the front of the clothing, whether it has soaked the inner garments, or again, whether it has collected along the back; for these appearances will sometimes demonstrate whether a wound was inflicted while the person was sitting, standing, or lying down. For example, if the throat is cut while the person is lying down, the blood will be found on each side of the neck along the back and not down the front of the body. Few suicides cut their throats in a recumbent position, and this distribution of the blood may serve to distinguish a suicidal from a homicidal wound.

The condition of the clothing may also serve to show whether there has been any struggle, and the presence of dry spots or mud on it may sometimes serve to connect an accused person with an act of murder. This is well illustrated in the case of Reg. *v.* Snipe, reported in Beck's "Medical Jurisprudence," where evidence was adduced to show that some spots of mud on the boots and clothing of the prisoner, when examined microscopically, contained infusoria, shells, and some rare aquatic vegetables. The mud of the ditch close to where the body was found, as also the mud on the clothing of the dead body, presented the same microscopical appearances. The medical expert who gave this evidence swore that in his opinion the mud spots on the body and on the prisoner's boots were derived from the same ditch, for the mud of all the other ditches in the locality was found, on microscopical examination, to be different. The well-known case which occurred in New York a few years ago, known as the "Shakespeare case," furnishes an example of the importance of carefully examining all stains on the clothing found on bodies.

If there are several stabs or cuts on the body involving the dress, it should be noted whether they are blood-stained, and if so, whether the stain is on the inside or outside of the garments, for sometimes in simulated personal injury a stain of blood may be inadvertently applied to the outside of the dress, as in wiping a weapon.

Weapons.—If a weapon is found, the character of the weapon and its exact position should be noted. This is frequently of importance in telling whether a person has died from an accidental or self-inflicted wound. In a case where death occurs immediately or within a few minutes, the weapon is found near the body, or often so tightly grasped in the hand that it can be with difficulty removed. If the weapon is found near the body it should be noted on which side and at what distance, and it must be questioned whether it could have fallen on the spot or been thrown there by the deceased. It is compatible with suicide that the weapon should be found at some distance from the body. An instance has been recorded where an individual was discovered in bed with his throat cut, and the bloody razor was found closed and in the pocket of the deceased. If a weapon cannot be discovered, or is concealed,

it is strong presumptive evidence of homicide; especially when the wound is such as to produce speedy death.

Note whether the weapon is sharp or blunt, straight or curved. If a knife, the handle and inner portion should be examined, for the blade may have been washed.

If the wound has involved any large vessels, it is improbable that the weapon can have been thrown any distance from the body, and when it is, there are always fair grounds to expect interference with the original position of the body. One circumstance which always strongly points to suicide is the finding of the weapon firmly grasped in the hand of the cadaver. The hand of a dead person cannot be made to grasp or retain a weapon as does the hand which has grasped it at the last moments of life. The amount of blood on the weapon should be noted, but it must be remembered that a knife may have produced a fatal stab wound and still no blood be found on it. This is explained by the fact that in a rapid plunge the vessels were compressed, and only after the drawing of the knife and relieving of the pressure blood began to flow, or possibly the blood may have been wiped off the knife by the elasticity of the skin.

When a person has died of a gunshot wound, especially at close range, it is important to look for any wadding or paper found in the wound, as in a number of instances the finding of such has led to the detection of the criminal. For example, handwriting has been found on the paper, or it has formed part of a printed page the rest of which has been found in possession of the accused. When a gun is discharged near the body, a portion of the wadding is almost always found in the irregular wound produced.

POST-MORTEM EXAMINATION.

Having completed the examination of the surroundings, one next proceeds with the post-mortem examination, which should be conducted according to a well-defined plan, following which the results obtained will always be satisfactory.

If possible the body should be removed to a large, well-ventilated, and especially well-lighted room. No artificial light, if it can possibly be avoided, should be used when performing

the autopsy; artificial light is especially bad on account of its yellowness and its power to modify natural color. Many diseased conditions cannot be satisfactorily determined by artificial light. The body should be placed on a high table, and the facility with which the autopsy is made will often depend on having the table high enough to render stooping unnecessary. Never make an autopsy, if it can possibly be avoided, on a body while in a coffin, as the examination is always unsatisfactory. The size and surroundings of the room, and how it is lighted, should be entered in the note-book.

Instruments.—If possible the following instruments should be at hand before proceeding with an examination, although some of them may be dispensed with:

(1) Large section knife; (2) scalpels; (3) enterotome (for opening intestines and stomach); (4) costotome, or large bone forceps (for cutting ribs); (5) scissors, large and small (one blade blunt); (6) saw; (7) chisel; (8) dissecting forceps; (9) probe; (10) blowpipe; (11) curved needles and strong twine; (12) measuring and graduated glass; (13) small scales.

Besides the above instruments, some basins containing water; sponges, bottle of flexible collodion, Lugol's solution of iodine for the amyloid test, will be needed.

Post-Mortem Wounds.—Various plans have been proposed to protect the operator's hands from the post-mortem wounds which are often so dangerous, such as wearing rubber gloves, smearing the hands with carbolized vaselin, both of which have their disadvantages: the gloves being too clumsy, and the vaselin rendering it almost impossible to hold the knife steady. Gloves should always be worn, however, where the body has undergone much decomposition, or where the person may have died from any septic disease. A method which I have found satisfactory is to cover all cuts and hangnails with flexible collodion, and then to have a basin of clean water at hand, and from time to time to rinse one's hands in the water. It is from bathing the hands in the cadaveric fluids and not from cuts that most of the danger comes. If possible an absolutely new board, large enough upon which to examine the organs, should be at hand, for it may be claimed at a trial that the organs and tissues, if placed and examined on surrounding objects, have become contaminated.

Toxicological.—If a chemical analysis of the various organs and tissues is to be made, and it is impossible to have the chemist present, the medical examiner should obtain some new glass jars of suitable size, with close-fitting glass covers. These jars shoud be rinsed with distilled water, and in them the various organs are to be placed; if possible with no preserving fluid on them. But if it is found impossible to deliver the jars to the chemist at once, alcohol may be poured over the organs in the jars, but it is specially important that a sample of this alcohol should be retained, that a chemist may at a future date test the same for any impurities. After the organs and tissues have been placed in the jars, the mouths should be closed and sealed, and the seal remain in the custody of the examiner until the jars are delivered to the chemist.

Parts to be Preserved for the Chemist.—In cases of suspected poisoning, it is not sufficient that the stomach and intestines alone should be preserved for the chemist as has been indicated, each part by itself; for it should be remembered that the portion of poison remaining in the alimentary tract is but the residue of the dose which had been sufficient to destroy life, and if the processes of elimination have been rapid no trace of the poison will be found in the alimentary canal but can readily be detected in other organs. Again, the poison may not have been introduced by the mouth, in which case none may be found in the digestive tract.

The chemist should receive, besides the stomach and entire intestinal canal, the liver, one or both kidneys, the spleen, a piece of muscle from the leg, the brain, and any urine found in the bladder.

When it is impossible for any reason to obtain the whole of any organ, the part removed should be carefully weighed and its proportion to the rest of the organ noted.

It is also of extreme importance to preserve in sealed and labelled jars those parts of a body which may show the evidence of disease, or on the appearance of which one's evidence is founded.

ORDER OF AUTOPSY.

In making the autopsy, the operator should stand on the right side of the body and make the incision by grasping the

knife firmly in the hand, and cutting with the whole of the blade and not with the point. The knife should be swept along from the shoulder rather than from the wrist, thus making a long, smooth, deep cut; never a jagged one.

The method of examining the human body after death will vary somewhat according to the objects in view. These objects may be threefold: (1) To ascertain whether a person has died from violence or poison; (2) to establish the cause of death, especially if it has been sudden; and (3) to ascertain the lesion of a disease, or to confirm a diagnosis.

The only difference between a medico-legal and pathological autopsy is that in the former case everything which might subserve the ends of justice should be carefully noted, and the changes found most accurately described; especially any abnormalities found on the external examination of the body. A photograph should be taken of the body.

The head should be opened and the brain examined first, and not last, as is often done in the ordinary autopsy.

Careful notes should be taken during each step of the examination, to be reread, verified, and signed at the completion of the autopsy.

It must be remembered that most of the lesions of disease which are found, indicate the disease rather than the cause of death; that often the lesion found will seem hardly extensive enough to cause death, and that from accidents and injuries apparently trivial, death may result. It must often be acknowledged that no sufficient cause of death can be found, but the more accurate and careful the examinations (especially when a microscopical examination of the organs is made) the fewer will be the number of such cases. If no apparent lesion is found, it must not be forgotten that many poisons destroy life and leave no trace that the pathologist can discover.

Care should always be exercised not to mistake the ordinary post-mortem appearance which we find at autopsies for the lesions of disease.

The examination of the human body, whether it be made from a medico-legal or pathological standpoint, is divided into two main divisions:

(1) The external examination, and

(2) The internal examination.

EXTERNAL EXAMINATION.

Its minuteness will depend on the character of the case, as when the person is unknown, or when suspected to have died from unnatural causes. In such cases the external examination is very important.

The following are the steps to be followed:

(1) Give a **general description** of the body; apparent age, height, and weight of the individual; color of the hair and eyes; condition of the teeth; and the evidence of any personal peculiarities or abnormalities.

(2) Note the **color of the skin** and observe whether there are any spots of CADAVERIC LIVIDITY, and if present where situated.

(3) **Contusions.**—Note whether there are any contusions, and, if present, their character, situation, length, breadth, and depth should be described, and whether they are accompanied by inflammation or by the evidences of gangrene.

It is often important to determine whether a contusion has been inflicted before or after death. This is to be done by cutting into the ecchymoses and if the extravasated blood or the coloring matter of the blood is found free in the tissues, one can be almost certain that it is an ante-mortem injury. In post-mortem discolorations the blood is found in the congested vessels. The situation of ante-mortem contusions will not generally correspond to the discolorations produced by decomposition; the latter being confined to the most dependent parts. It should be remembered that the contusions produced by blows on a body dead only a few hours cannot be distinguished from those which were received during life; and also that putrefactive changes make it well-nigh impossible to distinguish between ante-mortem and post-mortem injuries. It should also be borne in mind that blows or falls sufficient to fracture bones or rupture organs may leave no mark on the skin (see WOUNDS, Vol. I., pp. 467, 474, *et seq.*).

(4) **Wounds.**—The situation, depth, extent, and direction of any wound should be recorded, as also the condition of its edges; the changes in the surrounding tissues, and whether inflicted by a cutting, pointed, or rounded instrument; or by a bullet. In the latter case the course and direction of the ball should be

ascertained by dissection rather than by the use of the probe, and the character of foreign bodies, if any are found in the wound, should be noted. What nerves or blood-vessels, particularly arteries, have been injured, should be ascertained. It is often important to determine whether a wound was made before or after death. The following may serve as a differential point: In all wounds made after death there is slight bleeding, non-contraction of the edges, and absence of blood in the tissues. This is the opposite of ante-mortem wounds. Again, wounds inflicted within two hours after death cannot be differentiated from those made during life (see GUNSHOT WOUNDS, Vol. I., p. 610 *et seq.*; WOUNDS, Vol. I., p. 476 *et seq.*).

(5) **Fractures.**—If there are any evidences of fractures, the situation of the bones involved should be noted, and whether they are accompanied by contusions of the soft parts. Fractures which are inflicted during life are always accompanied by much more extravasation of blood, more injury to the soft parts, and more evidences of reaction than those occurring after death. It is a well-known fact that it is much more difficult to produce a fracture in a dead than a living body (see WOUNDS, Vol. II., p. 482 *et seq.*).

(6) **The temperature** of the body should be taken.

(7) **The rigidity and flexibility** of the extremities should be ascertained.

(8) **The state of the eyes** should be noticed, and the relative size of the pupils.

(9) Attention should be paid to the condition of the cavities of the mouth and nose. The neck should be specially examined for marks of external injury, or signs of ecchymosis or compression.

(10) **Genitals.**—The external genitals should be very carefully examined for evidence of injury, the presence of syphilitic lesions, and in the female the condition of the vagina should be particularly ascertained.

(11) **Œdema of the Feet.**—If there is evidence of œdema in any part of the body, especially about the ankles, its situation and extent should be noted.

(12) **Ulcers and Abscesses.**—The situation and extent of any ulcer found on the body should be recorded, as also the presence and situation of any abscess.

(13) **Burns.**—The extent of a burn, as also the state of the parts involved, should be noted. For example, whether they are inflamed or show blisters, etc. (see HEAT AND COLD, Vol. I., p. 647 *et seq.*).

(14) **Hands.**—In medico-legal cases the hands of a dead person should always be examined for the presence of cuts, excoriations, or foreign substances found upon them; especially should the dorsal extremities be examined. This examination will often indicate that there has been a mortal struggle before death. The impression of a hand or of some of the fingers is often found on the skin of a dead body. The exact situation where found should be noted. This may be of importance, as when it occurs where it would have been impossible or improbable for the deceased to have caused it.

For appearances in death from lightning or electricity, see Vol. I., p. 701 *et seq.*, and in death from hanging, strangulation, and garroting, see Vol. I., pp. 713, 746, 781, *et seq.*

INTERNAL EXAMINATION.

Having completed the examination of the external parts of the body, the next proceeding is to open the body and make an internal examination.

This should be done by following a regular method, so as to examine the relations of parts and not to injure one organ while removing another.

In opening the various organs an incision should be made which will expose the greatest amount of surface at one cut. Never make a number of small and always unsatisfactory incisions in an organ. In opening certain organs like the brain and heart, the incisions are so planned that the parts of the organ may be folded together, and, if necessary, their relations to one another and the whole organ studied. Such organs are opened as one would open a book to examine its pages.

It is important to remember that after death the blood leaves the arteries and left side of the heart, and collects in the veins and the right cavities of the heart. Especially does it collect in the vessels of the most dependent portions of the body and of the various organs, so that local congestions may often disappear after death; and again, they may be found at an

autopsy where they were not present during life. Especially is this true of the mucous membranes such as those of the trachea and bronchi, and also of the blood in the sinuses of the dura mater.

In making autopsies it is a cardinal rule that *all* the cavities of the body should be examined, and not alone the one where one might expect to find a lesion. At medico-legal autopsies, the great cavities—the head, the thorax, and the abdomen—should be examined in their successive order from above downward. The reason for beginning with the head is that the amount of blood in the brain and its membranes may be determined accurately; for, if the heart and great vessels of the neck are opened first, the blood will drain away from the brain and local congestions disappear. In pathological autopsies, the opening of the head first is not so important, and often the vertebral column need not be opened at all, for it is a complicated process and takes time; but in medico-legal cases, especially where a question as to the cause of death may arise, and has not satisfactorily been determined, after all the other cavities are examined the vertebral column should always be opened and the cord removed.

The Head.

Make an incision across the vertex of the skull from ear to ear. Dissect the anterior flap forward until within about three inches of the bridge of the nose, and the posterior flap backward to the external occipital protuberance. Examine the internal surface of the scalp for ecchymosis and evidences of injury. A circular incision is then made with a saw through the cranium as far backward and forward as the flaps have been reflected. An incision through the temporal muscle is necessary so that the teeth of the saw may not become clogged by the muscle fibres. When the cranium has been sawed through, a stout hook is inserted under its upper edge and it is removed with a quick jerk. If the dura mater is very adherent to the calvaria, it may be necessary to remove it with the bone, by cutting through it at the level of the cranial incision. Examine the calvaria as also the other bones of the skull after the brain has been removed and the dura stripped off, for evidence of fracture.

Note the symmetry, thickness, and density of the cranial bone, and remember that depressions along the sagittal suture are for the Pacchionian bodies, and are not pathological.

Dura Mater.—The dura mater may be slightly adherent to the bone of the cranium. This is especially seen in old people and does not indicate disease. The Pacchionian bodies are seen along the longitudinal sinus. Examine the internal surface of the dura mater for the presence of clots, tumors, or inflammatory lesions. Open the longitudinal sinus and examine for thrombi. Remove the dura mater by an incision following the cranial incision, the falx cerebri between the anterior lobes being drawn back and divided. Note whether the dura mater is adherent to the pia mater, and the condition of its internal surface.

Pia Mater.—The brain, covered by the pia mater, is now exposed. Note the degree of congestion of the membrane, its adherence, and the existence of pus, blood, or serum on its surface or in its meshes. Remember that a considerable amount of serum may be present within normal limits, especially in cachectic subjects, without indicating disease, but when the serum is so extensive as to raise the pia mater and to depress the convolutions, we have a pathological amount which may be a simple dropsy due to some general cause, or the result of a chronic meningitis. Enough serous effusion in the pia mater to produce a condition which has been called by some writers "serous apoplexy," I believe never occurs as a primary condition.

Loss of transparency and thickening of the pia mater, especially along the longitudinal fissure, is often seen in old people and does not indicate disease.

Brain.—Remove the brain by raising the anterior lobes with the fingers of the left hand and cutting through the nerves, vessels, and the tentorium as they appear. The medulla is cut as low down as possible, and the brain as it rolls out is caught in the left hand.

After being placed on a clean board or in a large clean dish, it is minutely examined. The average weight of an adult male brain is forty-nine and one-half ounces; of the female, forty-four ounces. Its proportional weight to that of the rest of the body is as 1 to 45.

Lay the brain first upon its convex surface and examine the arteries at the base for atheroma, thrombi, emboli, and aneurisms. Examine the pia mater of the base, especially for the evidences of hemorrhage, tumors, tubercles, and inflammatory lesions. Next turn the brain over on its base, and proceed to open its various cavities and examine its internal structure. Separate the two halves of the cerebrum, until the corpus callosum is exposed. Make an incision downward and outward at the junction of the corpus callosum with the cerebrum, and the roof of the lateral ventricles will be cut through and their cavities exposed. Prolong the incision forward and backward so as to expose the cornua. The size and contents of the ventricles should be noted, as also the condition of the ependyma. The floor of the lateral ventricles being the most frequent spot of hemorrhage, if one is found its extent and the parts involved by it should be noted; especially its relation to the internal capsule.

Transverse incisions (about one-sixteenth of an inch apart) are made through the ganglia seen on the floor of the lateral ventricles. Thus any lesions in the substance of the ganglia will be disclosed. Three or four longitudinal incisions are now made outward into the hemispheres nearly to the pia mater. These will divide the hemispheres into long, prism-shaped pieces held together by the pia mater and a little of the cortex, thus enabling the brain afterward to be folded together, and the relations of lesions to the brain as a whole studied. The third ventricle is now examined by cutting through the fornix and corpus callosum at the foramen of Monroe. Next, the fourth ventricle is opened by a longitudinal incision through the lower portion of the vermiform process; its contents, the condition of its vessels and ependyma noted. Then the floor of the fourth ventricle is divided by transverse incisions one-sixteenth of an inch apart, and careful examination made for the presence of minute hemorrhages: for here is a place in the body where almost a microscopical lesion (hemorrhage) may cause sudden death. Each hemisphere of the cerebellum is now opened by a number of incisions starting from the fourth ventricle and passing outward into its substance. The presence of any tumors or hemorrhage in the cerebellum will now be recognized.

In opening the brain, when clots, areas of softening, tumors,

etc., are discovered, their exact location in relation to surrounding parts should be noted and the blood-vessels examined for areas of degeneration or aneurism. This examination can be facilitated by allowing a stream of water to flow over the affected part. This will wash out the affected area and allow the vessels to appear.

Eye.—In rare cases it may be necessary to remove the eye. This can be done by breaking through the roof of the orbit with a saw or chisel and dissecting away the muscles so as to expose the optic nerve and the posterior portion of the organ.

Thorax and Abdomen.

The body being placed on its back, and the operator standing on the right side, an incision is made through the skin, fascia, and muscles from the top of the sternum to the pubic bone, passing to the left of the umbilicus and dividing everything down to the sternum and the subperitoneal tissue. A small incision is now made through the peritoneum below the ensiform cartilage. Into this opening two fingers of the left hand are inserted, and by spreading the fingers and holding the knife horizontally the peritoneum can be divided to the pubes without injuring the intestines. The skin and muscles are now dissected from the chest as far back as the false ribs. This dissection may be facilitated by keeping the skin and muscles on the stretch and cutting with the flat part of the knife. In order to better expose the abdominal cavity, the recti muscles are divided beneath the skin at their insertion in the pubic bone. Examine the cut surface of the chest and abdominal muscles, and note their color, amount, and consistency. Observe whether the chest muscles show the evidence of any parasitic disease such as trichinosis. The mammary glands are now examined from behind and opened if necessary.

Superficial Examination of Abdominal Cavity.—This should be done before opening the chest cavity, because the position of organs may become modified, and blood and other fluids are liable to find their way from one cavity into another; and again, the blood in the presenting portion of the abdominal organs will change its color after exposure to the air.

Note the Following Points: (*a*) The *relative position* and *general condition* of the abdominal organs.

(*b*) The *color* and *amount of blood* in the presenting parts.

(*c*) Whether there are any *signs* of *inflammation* or the evidence of foreign bodies or tumors.

(*d*) Examine the *vermiform appendix.*

(*e*) *The amount of fluid in the abdominal cavity.* Normally a small quantity of reddish serum will be found, particularly in warm weather, at the most dependent portion of the abdominal cavity. If the quantity is small it can only be ascertained by raising the intestines from the pelvis. When the fluid is considerable, the exact amount should be ascertained and its character noted.

(*f*) *Perforation*, *invagination*, and *hernia* of the intestines should be looked for.

(*g*) Determine the *height of the diaphragm.* Normally, on the right side, it is at the junction of the fifth rib with the sternum, and on the left it reaches as high as the sixth. A variety of pathological conditions change its position. For instance, it may be raised when the contents of the abdomen are greatly increased in volume, and in new-born children who have never breathed. It may be depressed by enlargement of the lungs, disease of the heart, or fluid in the pleural or pericardial cavities. The presence of air or gas in the pleural cavity can be determined either by filling the abdomen with water and puncturing the diaphragm beneath the fluid so that the air will bubble up, or a puncture may be made through the thorax between the ribs, and the flame of a match will be deflected by the escaping air.

Thorax.

The thorax is opened by cutting the sterno-costal cartilages as close to the end of the ribs as possible, the cut being made downward, outward, and backward, and the knife held obliquely so as not to injure the underlying parts. Quite often the cartilages will be found ossified and it will be necessary to divide them by a costotome. Next, separate the clavicles by a semilunar incision at their attachment to the sternum.

Raise the sternum with the left hand and separate it from the underlying parts. If there is any adherence of the sternum a slight twist will be sufficient to remove it.

Superficial Examination of Thorax.—Observe the position, color, and degree of distention of the *lungs*. It should be remembered that healthy lungs, as soon as the chest is opened, owing to their inherent elasticity, will collapse, and when this normal collapse is not seen it is generally due to a loss of elasticity as occurs in emphysema, to inflammatory diseases binding the lung to the chest wall, or to the alveoli being filled with solid or fluid substances or pent-up air. Most complete distention is seen when death is due to drowning or suffocation.

The area of the *heart* uncovered will vary according to the degree of collapse of the lungs and to the abnormal size of the heart. Normally the cardiac area exposed is quadrangular in shape, and about three and a half inches in its longest diameter. Examine the *pleural cavities* for the presence of adhesions, foreign bodies, or fluid. If fluid is found it should be removed, measured, and its character noted. It is to be remembered that in warm weather, or when putrefaction has commenced, a moderate amount of reddish serum is found in the pleural cavities which has no pathological significance. Lastly, examine the *mediastinum* as to the condition of the *thymus gland* and *great vessels* outside the pericardium.

Pericardium.—Open the pericardium by an oblique incision along the anterior wall, and prolong this incision downward and outward toward the diaphragm and upward to its reflection from the great vessels. Normally, about a drachm of clear serum, sometimes, however, blood-stained from decomposition, will be found in the pericardial sac. The amount is best ascertained by raising the heart. Note next the contents of the pericardium and whether there is any serous, fibrous, or purulent exudation. If an abnormal amount of fluid is present, remove, measure, and note its character. Observe whether there are any adhesions between the two surfaces of the pericardium. White patches are often seen on the visceral surface of the pericardium, especially over the ventricles. These have no pathological significance and are due to slight thickenings of the pericardium.

The Heart.—Having passed the hand over the arch of the aorta and noticed whether there is any evidence of aneurism or dilatation, we grasp the heart firmly by the apex, raising and drawing it forward. We remove it by cutting through the

vessels at its base. Test the sufficiency of the aortic and pulmonary valves by allowing a stream of water to flow into these vessels, the heart being held in a horizontal position and care being taken not to pull the valves open.

To apply the water test to the mitral and tricuspid valves, the auricles are first opened so as to expose the upper surface of these valves, and by allowing a stream of water to flow through the aortic and pulmonary valves into the cavities of the ventricles, the degree of sufficiency of these valves can readily be ascertained.

Another rough test is what is known as the "finger test." The mitral valve will normally allow two fingers, held flat and in contact, to pass through its opening. The tricuspid in the same way allows, normally, three fingers to pass; or if a more accurate test of the degree of insufficiency is desired, the valvular orifices should be measured. Normally, the aortic orifice is one inch across; the mitral, one and eight-tenths inches; pulmonary, one and two-tenths inches; and the tricuspid about two inches.

We open first the cavity of the right ventricle by making an incision over its anterior border close to the septum. Prolonging the incision downward to the apex and upward through the pulmonary artery, the cavity of the ventricle will be fully exposed. The left ventricle is similarly opened by an incision through its anterior wall which is prolonged upward through the aortic valve. The cavities of the auricle and ventricle, especially those of the right side, will often contain blood-clots. These clots are *usually* post-mortem clots formed during the last hours of life or after death. It may sometimes be necessary to distinguish these post-mortem clots from what are known as ante-mortem clots. The latter are usually of firm consistency, dry, of a whitish color, and closely entangled in the trabeculæ, while the former are succulent, moist, of a reddish-yellow color, and are easily detached from the walls of the heart cavities. Ante-mortem clots are rarely seen, and the medical examiner should be careful not to attribute the cause of death to the post-mortem clots which are so often seen. After the heart is opened we can with more care and greater accuracy examine the condition of the valves and recognize the extent of valvular lesions.

The condition of the endocardium should now be examined and any abnormality noted. Often it will be seen stained a deep red color. This is not due to disease, but is caused by the absorption of the coloring matter of the blood which has been set free by decomposition. The size of the heart cavity and the thickness of the heart walls should be noted, as also their consistency and color. It should be remembered that the heart walls may appear unusually flabby as the result of decomposition, or apparently thickened when death occurs in extreme systole. The interior of the heart can be further examined by passing the enterotome into each auricle, carrying the incision through the mitral and tricuspid valves to join at the apex with the previous incision, which has been prolonged through the ventricles to the apex. Thus the auriculo-ventricular valves are completely exposed.

Having removed the blood from the heart it is next weighed. The average normal weight of the human heart is about twelve ounces in the male, and a little less in the female: its size roughly corresponding to the closed hand of the individual. Normally, the thickness of the walls of the left ventricle about its middle is five-eighths to two-thirds of an inch, and of the right ventricle one-eighth to one-quarter of an inch.

Note the condition of the aorta above the heart, whether it is dilated, atheromatous, or shows calcareous deposits. Examine the coronary arteries by opening them with a blunt-pointed scissors. Disease of these vessels with thrombosis is one of the causes of sudden death which is often overlooked.

The Lungs.—The lungs are removed by lifting them from the pleural cavity and cutting through the vessels and bronchi at their base. If a lung is very adherent it is sometimes better to remove the organ with the costal pleura attached so as not to tear the lung substance. Examine the external surface of the lung as to its shape, color, and consistency. Next open the large bronchi with a blunt-pointed scissors, and prolong the incision into the pulmonary substance along the minute bronchi. Observe the contents of the bronchial tubes, the appearance of the mucous membrane, and their relative thickness. Remember that it is very difficult to tell the condition in which the mucous membrane was during life on account of the early post-mortem changes which affect it, and also because the contents of the

stomach may have been forced after death up the œsophagus and down the bronchi, giving the tubes a peculiar reddish and gangrenous appearance.

Having examined the bronchi, the lung is turned over and its base grasped firmly in the left hand. An incision is made from apex to base, which will expose at a single cut the greatest extent of pulmonary surface. Note the color of the lung substance, and whether the alveoli contain blood, serum, or inflammatory products. Blood and serum can easily be forced from the lungs by pressure between the fingers, while inflammatory exudations cannot. Examine carefully for the presence of miliary tubercles.

If a question should arise whether a portion of a lung is consolidated, this part can be removed, placed in water, and if the air cells are consolidated the portion will sink; if there is only congestion it will float. By squeezing the lung between the fingers an inflammation of the smaller bronchi (bronchitis) can be recognized by the purulent fluid which will exude at different points. It should be remembered that in normal condition the lower lobes and posterior aspect of the lungs will apparently be very much congested as a result of gravity.

Neck, Larynx, and Œsophagus.—Throw the head well backward, and place a block beneath the neck. Make an incision from the chin to the upper part of the sternum. Dissect the soft parts away on each side from the larynx and thyroid body, then cut along the internal surface of the lower jaw from the symphisis to its angle. Through this incision introduce the fingers into the mouth, and grasp and draw down the tongue. By dividing the posterior wall of the pharynx and pulling downward these parts, the trachea and œsophagus can readily be removed together, a ligature having been first placed around the lower portion of the œsophagus. Open now the pharynx and œsophagus along their posterior border. Examine the mucous membrane carefully for the evidences of inflammation, caustic poison, tumors, foreign bodies, or strictures. With an enterotome open the larynx and trachea along their posterior wall. Observe if there is any evidence of œdema of the glottis, and note the condition of the mucous membrane. Remember that redness of the larynx is very commonly the result of post-mortem changes and is also seen in bodies which have been kept cold. Dissect off and examine the thyroid gland.

Abdomen.

Having completed the examination of the organs of the thorax, we next proceed to examine those contained in the abdominal cavity. We first raise and dissect off the omentum, noting if it is abnormally adherent.

The first organs to be removed are:

The Kidneys.—Drawing the intestines aside we cut through the peritoneum over the kidneys, and introducing our left hand we grasp the organs with their suprarenal capsules attached. Raising first one kidney and then the other, we easily divide the vessels and the ureters as close to the bladder as possible. The kidneys are often found imbedded in a mass of fat which must first be removed. Their surface is sometimes of a greenish color owing to the beginning of putrefaction. We note the size of the organ, its color and weight. A normal kidney weighs from four and one-half to five ounces. Grasping the kidney firmly in the left hand, we make an incision in its capsule along its convex border, and with a forceps strip off the capsule and note its degree of adherence and the condition of the surface of the organ; whether it is smooth or granular. Prolonging our incision already made through the cortex of the organ, inward toward the pelvis, we divide the organ into two halves and now closely examine the internal structure. The average thickness of the cortex, which should be about one-third of an inch, is noted; as also its degree of congestion, and whether the normal light (tubes) and reddish (vessels and tufts) lines are seen running through it. If these alternate light and dark markings are lost and the organ has not undergone decomposition, the presence of some of the forms of Bright's disease may be suspected. If the cut surface of the organ presents a waxy appearance, the amyloid test should be applied by first washing the cut surface of the organ and dropping upon it a few drops of Lugol's solution of iodine, when the amyloid areas will appear as dark mahogany spots on a yellow background.

The pelvis of the kidneys should be examined for calculi and the evidence of inflammatory lesions. The suprarenal capsules readily decompose, but if the autopsy is not made too late

hypertrophy, tuberculosis, tumors, and degeneration in them may be recognized.

The Spleen.—This organ will be found in an oblique position at the left side of the stomach. Grasping it firmly in the left hand and drawing it forward, it can easily be detached. Normally in the adult it is about five inches in length by three inches in breadth by one inch in thickness, and weighs about seven ounces. The size, color, and consistency of the organ should be noted, as well as abnormal thickenings of its capsule and the presence of any tubercles or tumors in its substance. The spleen softens very early as the result of decomposition, and this decomposition should not be mistaken for a pathological condition.

The Intestines.—In cases of suspected poisoning the greatest care should be taken in the removal of the intestines and the stomach. Double ligatures should be placed in the following situations so as to preserve the contents of the organs intact: (1) at the end of the duodenum; (2) at the end of the ilium; and (3) at the lower portion of the rectum; and an incision should be made with a pair of scissors between these ligatures. The jejunum and ilium should first be removed together by seizing the gut with the left hand, keeping it on the stretch, and cutting with a pair of scissors through the mesentery close to its intestinal attachment. The cæcum, colon, and rectum should then be removed in a similar manner.

The intestines being placed in large absolutely clean dishes, which have previously been rinsed with distilled water, are opened; great care being taken that none of the intestinal contents are lost. The small intestines should be opened in one dish and the large intestine in another. A portion of the intestines where morbid appearances are most likely to be seen in cases of poisoning are the duodenum, the lower part of the ilium, and the rectum. The comparative intensity of the appearances of irritation should be especially noted. For example, if the stomach appears normal and the intestines are found inflamed the possibility of poison from an irritant may be denied.

The intestines are opened along their detached border by the enterotome. Care should be taken to distinguish the post-mortem discolorations which are usually seen along the intes-

tines from those produced by disease. The former are most marked in the dependent portions. They are apt to occur in patches which can be readily recognized by stretching the wall of the gut. The darkish brown or purple discolorations which are sometimes seen as the result of decomposition are due to the imbibition from the vessels of decomposed hæmoglobin. Much care and experience are necessary to tell the amount of congestion which is within normal limits and to recognize changes of color produced by decomposition.

The pathological lesions ordinarily looked for in the examination of the intestines are ulcers, perforation, hemorrhages, strictures, tumors, and the evidences of various inflammations. To obtain an accurate idea of the various portions of the mucous membrane of the intestines, it is sometimes necessary to remove their contents. When very adherent this should be done by allowing as small a portion of distilled water as possible to flow over their surface. If any abnormalities are noticed along the intestinal tract, an accurate description should be given of their situation and extent; as also the amount of congestion seen in different portions of the intestinal tract.

If possible the different portions of the intestines, as well as the stomach, should be examined immediately after being exposed to view, as under the influence of the air those parts which are pale may become red, and slight redness may become very pronounced. In this way only can we estimate the degree of vascularity of the various parts after death. However, in cases of suspected poisoning, *when it is impossible for the chemist to be present at the autopsy, the medical examiner should not open the stomach and intestines*, but place them in sealed jars. As soon as possible afterward, the chemist being present, they should then be examined in the manner indicated. What may be lost by waiting, in changes of color which have taken place, will be more than counterbalanced by the data which the chemist will obtain from observing the contents and mucous membrane of the stomach and intestines when they are first exposed. The characteristic odors of certain poisons are so evanescent that they quickly disappear after opening of the stomach and intestines.

After a thorough examination of the intestines, they are to be put with their contents into wide-mouthed vessels, each

part by itself, and the basins in which they were opened washed with distilled water and the washings put into the same bottle. As soon as the intestines are transferred to the jars they should be sealed.

The Stomach.—The stomach and duodenum are removed together. They are opened by passing the enterotome into the duodenum and dividing it along its convex border, the incision being continued along the greater curvature of the stomach as far as the œsophageal opening. They should be opened in a large glass dish which has been carefully washed with distilled water. The chemist and medical examiner will carefully note the quantity, odor, color, and reaction of the stomach contents; also whether luminous or not in the dark; the presence or absence of crystalline matter, foreign substances, undigested food or alcohol.

Portions of the contents should be placed in a small glass bottle and sealed, so that at a future time they may be examined microscopically. Only in this way can an absolute knowledge of the character of the stomach contents be obtained. In certain medico-legal cases the ability to decide the character of the stomach contents is of the utmost importance. The mucous membranes of the stomach and duodenum must be next carefully examined for evidences of hemorrhages, erosions, tumors, and of acute or chronic inflammations. The appearance of the rugæ and their interspaces, principally in the region of the greater curvature, should be noted; because here traces of poison and its effects are most frequently seen. If the stomach is inflamed, the seat of the inflammation should be exactly specified, as also that of any unusual coloration.

The condition of the blood-vessels are also noted. Vascularity or redness of the stomach after death should not be confounded with the effects of poison or the marks of disease. It may occur in every variety of degree or character and still be within normal limits. Vascularities which we might call normal are seen in the posterior part of the greater end and in the lesser curvature, and may cover spaces of various extent. Rigot and Trosseau have proven by experiment that various kinds of pseudo-morbid redness may be formed which cannot be distinguished from the varieties caused by inflammation; that these appearances are produced after death and often not

until five or eight hours afterward, and that they may be made to shift their place and appear where the organ was previously healthy, merely by altering the position of the stomach. Ulcers, or perforations of the stomach as the results of disease, as also the digestion of the stomach after death, have been mistaken for the effects of *irritant poisons*.

When perforation of the stomach is the result of caustic poisons, the edges of the opening are very irregular, and are of the same thickness as the rest of the organ. The parts not perforated are more or less inflamed, and traces of the action of the caustic are found in the mouth, pharynx, and œsophagus. This is the opposite condition to that seen in spontaneous perforation.

In considering perforation of the stomach the following points given by Taylor are well to remember:

(1) A person may have died from perforation of the stomach and not from poisoning.

(2) A person laboring under disease may be the subject of poison.

(3) A person laboring under disease may have received blows or injuries on the abdomen, and it will be necessary to state whether the perforation did or did not result from the violence.

(4) The perforation of the stomach from post-mortem changes may be mistaken for perforations from poison.

Corrosives, if they do not produce perforation of stomach, will generally cause intense inflammation accompanied by softening of the inner coat, sometimes ending in gangrene. The inflammation varies as to its extent and intensity, sometimes affecting principally the mouth and œsophagus, but generally the changes are more pronounced in the stomach and duodenum, while in rare cases the inflammatory process may extend through the whole alimentary canal. The mucous membranes are sometimes bright red with longitudinal or transverse patches of a blackish color, formed by extravasated blood between the coats. *Carbolic acid* often produces in the stomach and œsophagus white patches—when these patches are carefully examined, an ulcerated surface beneath them is generally seen.

Narcotic Poisons.—It is a common but mistaken idea that these poisons produce some mark or characteristic effect upon the stomach walls; that they induce a rapid tendency to putre-

faction; that the blood is in a fluid state; that hemorrhages are seen in various parts; that the stomach and intestines show sloughing without any inflammation. Some of these conditions may and probably do occur, but they are far from being invariable in their appearance. Experiments made by Orfila on animals with narcotic poisons prove the above statement. In conclusion, I would emphasize the fact that the *narcotic poisons produce no characteristic changes in the stomach that can be detected.*

The Liver.—The liver should be removed from the body and no attempt made to examine the organ *in situ.* After raising first one lobe and then the other, the diaphragm should be cut on either side and the suspensory and lateral ligaments divided, then the organ can easily be removed. The weight of the organ is ascertained, as also the measurements of its size recorded. The normal weight is from fifty to sixty ounces. The organ is normally about twelve inches in length by seven inches in depth by three and one-half inches in thickness.

The gall bladder is first examined to determine the character and amount of the bile and the presence or absence of gall stones, inflammatory lesions, and tumors.

At autopsies the surface of the liver, especially along the free border, is generally seen to be of a greenish or dark-brown color. This discoloration is due to the action of the gases developed by decomposition on the coloring matter of the blood, and has no pathological significance. The character of the surface of the liver is now noted, whether smooth or rough. The organ is opened by deep incisions in various directions, and the color, consistency, and blood supply of the liver tissue carefully recorded. The presence of new connective tissue, amyloid degeneration, abscesses, or tumors should not be overlooked. It should be remembered that, of all the poisons, phosphorus alone leaves characteristic appearances in the liver.

The Pancreas.—The pancreas is now easily removed, and its size and weight recorded. Normally it should weigh three ounces and measure eight inches in length by one and one-half inches in breadth by one inch in thickness. The organ should be opened by a longitudinal cut and examined for evidences of acute or chronic inflammation, fat-necrosis, tumors, calculi, and amyloid degeneration.

Genito-Urinary Organs.—It is very important in medico-legal cases that all the urine should be preserved and obtained uncontaminated; therefore before the bladder is opened a catheter should be introduced and the urine drawn off into a clean bottle which has previously been rinsed with distilled water. If more convenient the bladder itself can be punctured at its upper portion, a pipette introduced, and the urine drawn off in this manner.

The genito-urinary organs are removed together. This is done in the following manner. The body of the penis is pushed backward within the skin and cut off just behind the glans penis; the remaining portion of the rectum is raised. This with the prostate gland, bladder, and penis attached is removed by carrying the knife around the pelvis close to the bone and separating the pubic attachments. The organs are then laid on a clean board and the urethra is opened on a grooved director passed into the bladder, and the incision prolonged so that the internal surface of the bladder itself will be completely exposed. Examine the *urethra* for strictures, inflammatory lesions, and ulcers. Examine the *bladder* for congestion, hemorrhages, inflammation, and ulcers of its mucous surface, and note the thickness of its walls. Open the *rectum* and examine for ulcers, strictures, tumors, and the evidence of hemorrhage. The *prostate* gland is opened by a number of incisions into its substance. Examine for hypertrophies, tumors, and inflammatory lesions. Force the *testicles* through the inguinal canal, and cut them off. Weigh, open, and examine them for evidence of inflammation, tuberculosis, and tumors.

Female Organs.—Before removing these organs, any abnormalities such as adhesions, malpositions, and tumors should be noted. Dissect the organs away from the pelvic bones by carrying the point of the knife around the pelvis close to the bone. Cut through the vagina at its lower third, and the rectum just above the anus. The organs can now readily be removed. Examine the *vulva* for ulcers, hypertrophies, and tumors. Open and examine the *bladder*. Open the *vagina* along its anterior border and carefully examine its mucous surface for evidences of inflammation.

The Uterus.—Before opening the uterus, its size and shape should be recorded. The average normal weight of the organ

is about one and one-quarter ounces; its length three inches, breadth two inches, and thickness one inch. Open the organ along its anterior surface by a blunt-pointed scissors passed through the cervix, and the incision carried as far as the fundus. Note the thickness of its walls and any abnormalities of its mucous membrane. During menstruation, the mucous membrane of the body is thickened, softened, and covered with blood and detritus. Retention cysts are found in the mucous membrane of the cervix and are not generally of pathological significance.

Remove, measure, and weigh the *ovaries*. Their normal weight is about one drachm each; their size, one and one-half, by three-quarters, by one-half inch. Open the organs by a single incision and examine for the evidences of acute and chronic inflammations, tumors, and cysts. The *corpora lutea* in various stages can be easily recognized in the substance of the organ. Open the *Fallopian tubes* and examine their contents and the condition of their membranes (see DISPUTED PREGNANCY AND DELIVERY, Vol. II.).

THE SPINAL CORD.

To remove the cord, the body should be placed on its face with a block beneath the thorax. An incision is made through the skin and muscles along the entire length of the vertebral column and the soft parts dissected away so as to expose the transverse process of the vertebræ. The lamina are divided with a saw through the articulate process (a double-bladed saw specially adapted for this work can be obtained). After the lamina have been completely severed, these together with the spinous process can now be readily torn away with a stout hook and the cord exposed. A long chisel with a wooden mallet will often greatly facilitate this work. Great care should be exercised not to injure the cord. The roots of the spinal nerves are now severed, and the cord removed within its membrane. It should be remembered that serous fluid within the membranes of the cord, as also intense congestion, especially along its posterior aspect, is often seen as the result of post-mortem change. The cord is laid on a clean board and the dura mater opened with a blunt-pointed scissors along its anterior aspect, and an examination made for the presence of hemorrhage, inflamma-

tory lesions, and tumors. Softening of the cord can generally be detected by the finger passed along it. This, however, is not a perfectly accurate test, especially if the body has been dead some time. The cord is now cut by transverse incisions about half an inch apart throughout its entire length, and the cut surface examined for the evidences of disease such as hemorrhages, softening, and inflammatory lesions.

After the cord has been removed, examine the vertebral column for the evidences of fractures and displacements.

LATE AUTOPSIES.

Late autopsies are those performed after partial or complete destruction of the soft parts of the body, through the natural processes of decomposition, or the examination of bones exhumed long after interment. The term may be employed also to mean the inspection of an embalmed body, dead for some time.

The object of late autopsies is to determine identity, or to establish the guilt or innocence of suspected persons. An examination of the skeleton even many years after death may give important information as to the manner in which the deceased came to his end. This cannot better be illustrated than by the citation of one or two cases.

In the celebrated case of "Eugene Aram," the bones of his victim were discovered thirteen years after the crime had been committed. A man who afterward proved to be Aram's accomplice was arrested on suspicion. He confessed the crime, and the opinion formed by the medical witnesses was confirmed by his statements. The skull presented evidence of fracture and indentation of a temporal bone. Aram argued the case in his own behalf, but the testimony was too strong against him: he was convicted and executed.

Taylor records the case of a man, Guerin, who was convicted of the murder of his brother from evidence obtained from an examination of the skeleton three years after interment. Here, again, blows upon the head were the cause of death, and the fractures were plainly perceptible upon the exhumed skull.

An autopsy upon a body before the soft parts have been

entirely destroyed, or upon an embalmed body, should be conducted in much the same manner as ordinary autopsies. In these cases the method of burial should be noted. If it be a case of murder, and the body has been hurriedly put into the ground, it is not likely that the custom of Christian nations has been observed—that of laying the body full length, with the head to the west.

In the case of partially destroyed bodies, the remaining soft parts will give little evidence of the mode of death unless the violence has been very extensive, and even then it may be impossible to determine whether a wound was inflicted prior to or after death. Recourse must be had to the skeleton, and the only evidence it can furnish is of fractures, unless, as happened in one case, a rope be found about the cervical vertebræ.

When the skeleton only is found, Taylor lays stress upon the following points:

(1) Whether the bones belong to a human being or one of the lower animals.

(2) If a human being, whether male or female.

(3) The length of time they have probably remained in the ground.

(4) The probable age of the individual to whom they belonged. If the maxillary bones be found, much information may be obtained from an examination of the teeth.

(5) The probable stature of the individual during life.

(6) The race to which he belonged. The conformation of the skull and thickness of the bones will give important information on this point.

(7) It should be determined whether solitary bones belong to the right or left side, and whether they form parts of one or more than one skeleton.

(8) Whether they have been fractured, and if so, whether it occurred during life, or by accident at the time of the exhumation. If it occurred during life, whether it be recent or of long standing.

(9) The presence or absence of personal deformities, of supernumerary fingers or toes, of curvature of the spine, of ankylosis of one or more joints.

(10) Whether they have been calcined, as murderers sometimes try to make away with the bodies of their victims by

burning. Especially is this the case in infanticides (see IDENTITY, Vol. I., p. 408 *et seq.*; TIME OF DEATH, Vol. I., p. 452 *et seq.*).

AUTOPSIES OF FRAGMENTS.

These cases are usually cases of murder in the perpetration of which the criminal has mutilated the body with a view to destroying all traces of identity.

The importance which attaches to autopsies of fragments rests upon the fact that parts of a body may be found widely separated, and that one portion may be found before the others. In such cases it will be necessary to determine if they belong to one and the same body. The examination is conducted chiefly with a view to establishing this.

The examiner must note the manner in which the fragment has been separated; whether it is clean cut, as by one who understood something of anatomy, or, whether it has been separated roughly and by one ignorant of the body structure. The determination of this point will be one link in the chain of evidence which may lead to the detection of the criminal, or the acquittal of one accused. An anatomist or a butcher would be likely to cut through at a joint, and to do it neatly. The exact point at which the severance has taken place should be noted. The place of finding, the circumstances under which found, the condition and general appearance of the fragment should all be carefully recorded. The color of the skin will indicate with some accuracy the race to which the individual belonged. The probable sex may be determined by the presence or absence of hair, and the general conformation. This, however, will not apply in the case of children. The probable age may be fixed upon from the size and degree of development of the fragment. The cut surface should be carefully described, and if possible a drawing should be made of it.

There are special considerations which apply to certain parts of the body.

The Head.—The exact point of severance should be recorded. The number of vertebræ which remain attached to the head should be counted, and if the section pass through a vertebra, its number and the amount of it missing should be stated. The sex will be apparent in all instances; the race may

be determined both by the color of the skin and by the shape of the head; the age may be approximated, though care must be had in expressing an opinion, for the manner of living is well known to affect the appearance of age. Evidence of violence prior to death should be noted, and the presence or absence of fractures ascertained; also observe the color of the hair and whether it be thin or abundant; the presence or absence of beard or mustache, and if present the color; and the color of the eyes.

The Arm.—The following points should be determined: the color of the skin as indication of race; the probable sex from its shape and general conformation; the probable age from its size and degree of development; marks of any kind, such as tattooing; and deformities, such as signs of old or recent fracture, or dislocation; and supernumerary fingers.

The Leg.—The examination of the leg should be conducted in much the same manner as that of the arm.

The Trunk.—An examination of the trunk will reveal the race, sex, and probable age, and may give evidence as regards the manner in which the deceased came to his or her death. Any marks or deformities should be recorded, and in all cases the viscera should be examined.

MEDICO-LEGAL REPORTS.[1]

After making a medico-legal autopsy, it will be necessary for the medical examiner to draw up a report of his findings, and the conclusions based thereon. The report should be clear and concise, and the language such as a coroner's jury can understand. Technical terms should be avoided, and when their employment is necessary they should be explained in the margin or in parentheses.

The report should be drawn up in somewhat the following manner:

1. When and under what circumstances the body was first seen; stating hour of day, day of week and month.

2. When deceased was last seen living, or known to be alive.

[1] The facts upon which the following statements are based have been largely drawn from Taylor. See Stevenson's Taylor, vol. i., p. 204 *et seq.*

3. Any circumstances that would lead to a suspicion of suicide or murder.

4. Time after death at which the examination was made, if it can be ascertained.

5. The external appearance of the body: whether the surface is livid or pallid.

6. State of countenance.

7. Any marks of violence on the person, disarrangement of the dress, blood-stains, etc.

8. Presence or absence of warmth in the legs, abdomen, arms, armpits, or mouth.

9. Presence or absence of rigor mortis.

To give any value to this point it is necessary for the witness to observe the nature of the substance upon which the body is lying; whether the body be clothed or naked, young or old, fat or emaciated. These conditions materially influence the rapidity of cooling and the onset of rigor mortis.

10. Upon first opening the body the color of the muscles should be noted. Carbon monoxide poisoning causes them to be of a cherry-red color.

11. The condition of the blood and its color.

12. The state of the abdominal viscera, describing each one in the order in which it is removed (see p. 370). If the stomach and intestines are inflamed the seat of the inflammation should be exactly specified; also all evidences of softening, ulceration, effusion of blood, corrosion, or perforation. The presence of hardened fæces in the rectum will bear evidence that no purging occurred immediately before death.

13. The state of the heart and lungs. (For special consideration of the lungs in cases of suspected infanticide, see Vol. II.; and of persons drowned, see Vol. I., p. 805 *et seq.*).

14. The state of the brain and spinal cord.

After a thorough consideration of the results of the examination, conclusions must be drawn from this examination; never from the statements of others. The conclusions commonly relate to whether death was due to natural or unnatural causes; if to unnatural causes, what are the facts which lead the examiner to this opinion. As the conclusions are intended to form a summary of the whole report, they must be brief and tersely stated.

PERSONAL IDENTITY,

INCLUDING

THE METHODS USED FOR ITS DETERMINATION IN THE DEAD AND LIVING.

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PERSONAL IDENTITY.

GENERAL CONSIDERATIONS.

IDENTITY is the determination of the individuality of a person. In jurisprudence the term is applied to the recognition of a person who is the object of a judicial action. The establishment of the individuality of a person is known as *absolute* identity; while the relations of a person with some particular act is known as *relative* identity.

The great number and variety of facts concerned in the investigation of questions of identity are of considerable gravity and importance in their juridical bearing, and at the same time they are among the most interesting and most useful of the applications of modern medicine to the purposes of the law.[1]

Among the varied researches of legal medicine looking to an interpretation of facts, no other question occurs in which the solution depends more upon morphological and anatomical knowledge, and none is more dependent upon purely objective, visible, tangible facts.

Personal identity often constitutes the entire subject-matter of dispute in a civil case. Upon it may depend the question of absence or of marriage, of kinship or of filiation involving the possession of an estate, in which case the court often requires the most subtle of scientific evidence to assist in its decision. Many anthropological and medical facts, now appropriated by criminology and penal science, are useful in proving not only the present but in attesting future identity, thereby preventing in great measure the dissimulation of prisoners, deserters, false claimants to life insurance, fraudulent pensioners, and the like.

Such matters are of daily occurrence. The special agents of the U. S. Pension Office detect and cause the punishment of

[1] Recent attention to such subjects by Italian writers places them in the foremost rank. Although their system of judicature differs from our own, this fact does not lessen the value of their medico-forensic literature.

many fraudulent claimants. Stratagems and conspiracies to defraud life-insurance companies go much further than mere substitution. Instead of a "fraudulent" a positive death may come up for investigation, and in order to defraud an insurance company of a large amount, a body may even be procured by homicide to consummate the deception, as was done in the Goss-Udderzook tragedy near Baltimore in 1872.

A celebrated case now before the Supreme Court of the United States and involving the question of personal identity is that of the Mutual Life Insurance Company of New York, the New York Life Insurance Company, and the Connecticut Mutual Life Insurance Company of Hartford, Connecticut (Consolidated), plaintiffs in error, *vs.* Sallie E. Hillmon.

It is pre-eminently in criminal trials that the personal identity of the victim often constitutes an essential connecting link. Before it can move, the law requires, at the outset, proof of the individuality of both the author of a crime and of the victim. I shall, therefore, not touch upon such elusive individuals as Charlie Ross and Jack the Ripper, but limit my remarks to a synthetical exposition of the best-known facts regarding identification of the dead body and the interpretation of its organic remains.

The identity of a living person, or even our own identity, is often a difficult point to establish. It may also require medical evidence, oftentimes of a most involved character, to establish the fact of death. Hence the medico-legal process of connecting a dead body, or the remains or traces of the same, with a human being once known to have lived and moved on earth, is beset with difficulties that may give rise to still greater antagonisms of evidence. The question of personal identity is one of the hardest that could possibly come before a court. Celebrated cases and judicial errors have given it great notoriety. There are consequently few questions in forensic medicine that require more attention and sagacity, and none upon which the medical legist should pronounce with more reserve and circumspection. Medical men are absolutely the *only* persons qualified to assist in resolving the really delicate question of personal identity; yet the physician and the lawyer pursue the same line of logic and of inquiry. As the former must have a subject to dissect or to operate upon, so must the

lawyer in pursuing a criminal investigation first prove a visible material substance known in legal phraseology as the *corpus delicti*, which he must connect with some personality, with some human being once known to have lived. In this important process the physician's testimony being the indispensable guide of the court's inference, he should limit himself to purely anatomical and material knowledge. The medical expert has absolutely nothing to do with guilt or innocence, as that is a question for the jury. He should, above all things, be absolutely free from prejudice, suspicion, or undue suggestion, and should remember that in thus sinking his personality his sole function as a skilled witness in cases of identity is to furnish testimony which, when taken in connection with other evidence in the case, may establish such a *corpus delicti* as would justify the inference of a crime.

A nice point may arise as to dispensing with the proof from the body itself, when the substantial general fact of a homicide is proved *aliunde*, as in the case of a criminal causing the disappearance of his victim's body by means of its decomposition in lime or other chemical menstrua, or by submerging it in an unfathomable spot in the sea. Under circumstances such as the following: a person is seen to enter a building and is not seen to leave it, although all means of egress therefrom are watched; another person is seen to ignite the building, which thereupon burns down, and the charred remains of a human body are found in the ruins; the proof of identity from the body itself might be dispensed with in view of the substantial general fact of a homicide having been committed. In a delicate case where the man of art hesitates and finds no *corpus delicti*, the investigation of imprints and stains may give a clew of great value to the expert. Yet it is only upon absolute evidence, and in the strongest possible case, that the fundamental principle of the *corpus delicti* is disregarded.

In the case of Ruloff, the child's body was not produced and no trace of it could be alleged to have been found; nevertheless the prisoner was found guilty of murder. This case was speedily overruled (18 N. Y., 179), on the ground that a dangerous precedent had been pronounced.

So indispensable is the showing of the *corpus delicti* in cases of recognition that lawyers have come to regard even the

judicial confession of an accused as often the flimsiest and most unsatisfactory kind of evidence. Numerous cases of demonstrated fallibility of confessions are cited in the books, where the statement was utterly lacking in anything except motive or hallucination. In the Proceedings of the New York Medico-Legal Society, December 6th, 1876, Mr. James Appleton Morgan mentions the case of a German servant-girl who assured her mistress, whose little boy, a child of seven, had just died and been buried, that she (the servant) had poisoned the boy. The servant swore to her crime and was taken into custody, and it was only when no poison was discovered upon exhuming the child's body and examining its stomach that against her own protest she was acquitted of the possibility of the crime. Another case of the kind that has had medico-legal notoriety was tried a few years ago before a court in Brittany. The accused declared that he had killed his servant and thrown the body in a pond. His guilt seemed certain, when the alleged victim put in an appearance, thus reducing the evidence to the strange hallucination that had prompted the confession.

But the most wonderful of these is the celebrated case of Boorn, in which medico-legal evidence took no part. In view of the seeming hopelessness of his case, the accused confessed to murder in expectation of mercy from the court, but was finally acquitted on the alleged victim walking into court and confronting the man who had sworn to having killed him.

Although wisdom and experience point to the necessity of showing something corporal and material in cases involving questions of life and death, yet very small traces or minute remains of a human body may, in certain circumstances, constitute a *corpus delicti* that may lead to trial if not to conviction. In 1868 the Lambert case, for murder on the high seas, was tried before Judge Benedict in the United States Court, the only *corpus delicti* alleged being a large pool of blood and brains found on the forecastle of a ship at sea, out of sight of land or other vessel. Circumstances, acts, and words pointed strongly to the murder of one of the crew, who was believed to have been brained with an axe and thrown overboard. Notwithstanding the fact that animosity was known to exist between the accused and the missing man, it further appeared that the accused, in a state of great excitement, had followed

the missing man forward and returned alone with a hatchet in his hand, yet the jury in this instance were not satisfied as to the establishment of a *corpus delicti* beyond a reasonable doubt and accordingly failed to convict.

Two classical cases, that of Gardelle and of Dr. Webster, mentioned in many of the books, stand forth as instances of conviction where fragments of the human body were recognized after attempts to destroy them by intense heat. The conviction of Dr. Webster rested almost entirely upon medico-legal evidence; but it is probable that upon the same circumstantial evidence the increased industry of counsel would have so rung the changes in regard to its uncertain and unsafe nature, and would have so used the knowledge gained from advanced discoveries in the regions of the probabilities of science, as to have secured the acquittal of the prisoner had the trial taken place at the present time.

A similar affair of great medico-legal interest is the Goss-Udderzook tragedy, already referred to, an account of which is given by Drs. Lewis and Bombaugh among the "Remarkable Stratagems and Conspiracies for Defrauding Life Insurance Companies," New York and London, 1878.

IDENTITY OF BURNT REMAINS.

The medical jurist will no doubt find cremation a formidable barrier in elucidating the question of identity, although the entire destruction of a dead body is a matter of extreme difficulty.

In the case of calcination chemical analysis of the ash would detect the phosphate of lime, but this would throw no light upon the subject, since the ash of human bones and that of the lower animals is identical. If the burnt bone is entire, the state of the epiphyses may enlighten the question of the determination of age. The following two cases, in which fragments or portions of bone had been submitted to the action of fire, show how medical training and some knowledge of comparative anatomy may contribute to the establishment of guilt or may attest innocence.

In the case of The Queen *vs.* John Henry Wilson, for murder, the accused burnt his step-father in a lime-kiln for

over a week, and on strewing ashes from the kiln fine fragments of bone picked up were afterward identified as human. At the trial identity rested on the fact of finding two buttons and a buckle, which were recognized as part of the deceased's wearing apparel when last seen.

In the second case, that of a young woman supposed to be in the family way who should not have been, it was thought that she had been confined and made away with the infant. Under this supposition the premises where she lived were searched by the chief constable, who found in the stove some bones and fragments of bones that had been burnt. On examination by a qualified medical man, the fragments turned out to be not human bones, but those of some other animal, presumably those of a pig and of a chicken, which the family, who lived in a tenement-house without a back yard, had put in the stove to get rid of the refuse.[1]

IDENTIFICATION OF HUMAN BONES.

In deciding whether certain bones are human or not, the medical jurist should exercise great caution in venturing an opinion as to the precise animal of which he may believe they formed a part. There is no great difficulty in detecting the smallest fragments of bone by means of the microscope, but we cannot say with safety whether the fragments belonged to a mouse, a man, or an elephant. A real difficulty occurs in recognizing the nature and origin of the bony remains when only a small fragment or a single bone is submitted for report. If a sufficient portion of the skeleton be submitted it can be easily recognized as human, as in the imbedded remains of the troglodyte found in the limestone deposit of Luray Cave, Virginia, and only in the exceptional case of the bones of one of the manlike apes could a difficulty of distinction arise. The characteristic signs that distinguish a gorilla skeleton, for instance, are the smaller thumb; notable length of tibia and of radius, although this relative length of extremities has been remarked in negroes; small facial angle, 30° to 40° in the monkey, 70° to 80° in man; very inferior cranial capacity, the maximum in a gorilla being 550 cubic centimetres, while the

[1] Canada Med. and Surg. Journal, 1875, vol. iii., pp. 56–60.

minimum in the human species is from 970 with a maximum of 1,500 to 1,900 centimetres; a low index of the foramen magnum; convexity of the squamo-parietal suture, and larger and more salient canines and incisors. The volume of the endocranium in the female gorilla, like that of the human species, is smaller than that of the male; this difference being almost 80 c.c. for the anthropoid female.

In studying the osseous system it should be remembered that certain modifying elements, as artificial compression, pathological deformities, posthumous distortions, and hygrometric conditions, may affect particularly the skull, and if due allowance be not made for these the study may lead to glaring absurdities. Not longer ago than 1725 there was found in a quarry at Œningen the skull of a fossil batrachian compressed into rude resemblance to the human cranium, which was announced to the world as Scheuchzer's "*Homo diluvii testis et theoscopos*," and as the remains of one of the sinful antediluvians who perished in the Noachic deluge.

Are the Bones Old or Recent?

An important point may arise in questions of identification of bones as to the oldness: whether they are old or recent. The first indication is furnished by the presence or by the absence of the soft parts. The existence of the periosteum and of the spinal marrow is the most persistent proof of a recent state; but these alone with the soft parts are usually destroyed in two or three years. In ordinary circumstances a body becomes skeletonized in about ten years, although in exceptional cases the cadaver may resist decomposition after many years.[1]

This summer in transferring an old cemetery in Georgetown, D. C., the remains of the grandmother of one of the writer's patients were found in such a state of preservation as to be easily recognized after fifty years of burial. More recently, in unearthing the remains of an old grave-yard in East Washington, a striking peculiarity was noticed in the fact that many bodies of young people buried in recent years when taken up consisted of a few blackened bones and shreds of grave-clothes,

[1] Some interesting facts by Dr. W. H. Holmes regarding "The Condition of Bodies Long Buried" may be found in the Boston Med. and Surg. Journal, July 23d, 1891.

while the remains of many older people buried long before the Civil War were found in an excellent state of preservation. One of these was a Mr. Fullin, who died from the effects of a sunstroke forty years ago and was buried in a metallic case. An old lady who attended his funeral was present when his remains were unearthed and said they looked as natural as when he was laid away in 1852. The features were well preserved and even the white linen of the shroud was unsoiled.

Alterations in the texture of the bone, such as that caused by dryness and by diminution in the proportion of organic matter, may be ascertained by histological examination, and one of the characters of age may be furnished by taking into consideration the specific weight. Placing the skull at an average density of 1,649, that of an infant would be 1,515, an adult 1,726, and that of old age 1,636.

Ascertaining the proportion of organic and inorganic matter, the phosphates and carbonates, by chemical means may furnish an additional help in the interpretation of the remains.

With all these diagnostic methods it may still be impossible to establish identity either absolute or relative, even where a whole skeleton is in question. The evidence may, however, be of great juridical use to the accused, as in the case of Van Solen, tried for the murder of Dr. Henry Harcourt, where the collective facts pointed to the identification of a body dead two years. The jury, however, after a second trial, were instructed to acquit unless they were certain that the remains were Harcourt's. They acquitted, as no *one* decided and apparent feature was known to have existed by which the remains could be identified beyond a doubt.[1]

Identity in Case of Entire Skeleton or in Case of Isolated Bones.

Where an entire human skeleton has been discovered, the objects of inquiry here, as in the case of fragments or remains, are to establish the identity of the victim and that of the author of the act, and to collect all available information relative to the nature of the death and to the diverse circumstances attending the commission of the deed.

[1] Quar. Journal of Psychological Medicine, N. Y., 1869, vol. iii., p. 691.

In gathering evidence from the examination of the skeleton or of isolated bones, with a view to find out the probable cause of death of the person of whom they form a part, a great variety of questions will arise for consideration, such as those relating to race, stature, age, sex, and trade or occupation; the exterior signs furnished by dentition; the traces of congenital peculiarity or of injury, and the signs of disease either hereditary or acquired.

Determination of Race.

The question of race in connection with the subject of identification is of more than usual importance in the United States, owing to our motley population, composed as it is of aboriginal Americans, Chinamen, negroes, and of Europeans and their descendants. I well remember the first human bones that I saw exhumed. They were discovered in digging the foundation of a building near a kitchen-midden on one of the tributaries of the Chesapeake Bay. The apparent oldness of the bones and the finding of stone arrow-heads, tomahawks, and fragments of aboriginal pottery in the immediate vicinity were additional accessory facts that strengthened the presumption of the bones being those of a Choptank Indian.

Roughly speaking, there is not much trouble in recognizing the platycnemic tibiæ of the mound-builder, the skull of a Flathead Indian, an Inca skull, a negro skull, or even the skull peculiar to the lower order of Irish.

In many very old skulls a considerable portion of hair is often found attached. This of course may lend assistance in the matter of race identity. A few years since I undertook at the Smithsonian Institution a series of micro-photographs of the structure and arrangement of hair, with a view to race classification as suggested by Professor Huxley. Various specimens of hair from the yellow races were compared with that of fair and of blue-eyed persons, with the hair of negroes, with reindeer hair, and with the hair-like appendage found on the fringy extremity of the baleen plates in the mouth of a "bowhead" whale. The experiments, though far from satisfactory, were sufficiently conclusive to enable one to recognize approximately the horse-like hair of some of the yellow races, that of the negro, and that of a blond Caucasian.

Beyond the forementioned characteristics, the task of race recognition from observation of the skull is one of great difficulty and perplexity with illusory results. A considerable experience of several years with the large collection of skulls in the Army Medical Museum enables me to speak advisedly on this point.[1]

Although the technical procedures of craniometry require special measurements and employ an arsenal of special instruments, the results are far from conclusive as regards the determination of human types. Time and space do not permit the mention even in epitome of the various methods most relied upon by trained craniologists. Among the oldest operations of cephalometry, as well as the most incomplete, is the measurement of the so-called facial angle, which is employed to distinguish the skull of a lower order of animal from that of the negro and the white man. This angle, acute in the skulls of the lower animals, approaches a right angle as we ascend the zoölogical scale; being from 30° to 65° in the various apes; 75° in the Mongolian; about 70° in the negro, and between 80° and 90° for whites. The prognathous (projecting) jaws of the negro cranium are distinctive, as well as the shape of the nasal opening, which in the black is an equilateral triangle, while it is isosceles in the white. The books usually speak of the Eskimo skull as pyramidal, which in point of fact is not true. Inspection and examination of a large collection of Eskimo crania has changed and greatly modified some of the previous notions of the conventional Eskimo skull. From more than one hundred, collected in the vicinity of Bering Strait,[2] I find that the skulls present very considerable variations among themselves; some being brachycephalic, others dolichocephalic. In many the facial angle is 80°, and in one instance 84°, which exceeds that observed by me in many German skulls. Nor is the prominence of the zygomatic arches such a constant difference in the configuration as to justify one in speaking of the skull as pyramidal. On the contrary, in many of the specimens lines drawn from the most projecting part of the zygomatic arch and touching the sides of the frontal bone, instead of forming a triangle

[1] See writer's article, "Cephalometry, Craniometry," in "Reference Handbook of the Medical Sciences."

[2] See writer's "Cruise of the Corwin" to Alaska and the Northwest Arctic Ocean, Washington, 1883.

on being elongated, might, like the asymptotes of a parabola, be extended to infinity and never meet. The index of the foramen magnum in these skulls is about the same as that of European crania. The internal capacity shows marked difference, the cubic contents of the endocranium averaging that of the French or Germans.

As some modern writers lay great stress on the measurement of the cranial capacity, not only as an aid to race identification, but as an adjunct in the study of the criminal and insane classes, it may not be amiss to give the salient facts relative thereto.

It is admitted that the cranial capacity may vary with the intellectual state, hydrocephalic skulls, of course, being excluded. Microcephalic adults give a figure inferior to that of gorillas, some being as low as 419 c.c. Andaman Islanders and autochthonous Australians appear, in respect to cranial capacity, to be most badly off. The capacity of an Andaman has been found as low as 1,094 c.c.; while that of Australians (autochthonous) and of some American tribes show an average capacity of 1,224 c.c. in the normal as well as in their deformed crania. The cranial capacity increases in the yellow races and attains its maximum in the white races. In the middle European race 1,500 c.c. may be accepted as the average; 1,750 c.c. is the maximum, and anything above is macrocephalic; while the minimum is 1,206 c.c., which is rather too low than too high. According to Topinard's nomenclature of the cranial capacity, macrocephalic in the adult European male are those having a capacity of 1,950 c.c. and above; a large skull is one of 1,950 to 1,650 c.c.; average or ordinary, 1,650 to 1,450 c.c.; small, 1,450 to 1,150 c.c.; microcephalic 1,150 c.c. and below. It would seem that the skulls of the insane are below the type, a measurement of sixteen male skulls giving an average of only 1,449 c.c. Scotchmen head the list with the most voluminous skulls, and according to a tabular statement made up from Welcker, Aitken, Broca, and Meigs, the English come next, with a capacity of 1,572 c.c. Then follow Eskimo, 1,483 c.c.; Germans, 1,448 c.c.; French, 1,403 to 1,461 c.c.; South African negroes, 1,372 c.c.; Ancient Peruvians, 1,361 c.c.; Malay, 1,328 c.c.; Mexican, 1,290 c.c.; Hottentot and Polynesian, each 1,230 c.c.; Australians, 1,364 c.c.; and Nubians, 1,313 c.c. The cranial

capacity in man, like that of the anthropoid apes, varies according to sex, the difference being so great that it is necessary to measure separately.

In the troglodyte skulls of prehistoric times the variation is not more than 99.5 c.c.; but in the contemporaneous races the difference varies from 143 to 220 c.c. French craniologists usually speak of the Auvernats as possessing the highest cerebral capacity (1,523 c.c.), and mention the skull of a Parisian of 1,900 c.c. as the highest known. Some Eskimo skulls, however, measure from 1,650 to 1,715 c.c., and two eurycephalic Indian skulls in the anatomical section of the Army Medical Museum measure respectively 1,785 and 1,920 c.c.

Mr. Havelock Ellis, speaking of the psychic characteristics of criminals, says that the lower human races present a far larger proportion of anatomical abnormities than the ordinary European population; and Sir William Turner writes of the skulls collected during the *Challenger* expedition that although their number is certainly too limited to base any broad generalization on, as to the relative frequency of occurrence of particular variations in the different races, there is obviously a larger proportion of important variations than would occur in a corresponding number of skulls of the white races. Thus, for example, the squamo-frontal articulation is found in less than two per cent of European skulls, while it is found in twenty per cent of negroes, according to Ecker, and 16.9 in Australian skulls, according to Virchow. Again, the spheno-pterygoid foramen is found in 4.8 per cent of European skulls and in 20 per cent of American Indians; 30 per cent in Africans; 32 per cent in Asiatics, and 50 per cent in Australians. The wormian bones are also more common among the lower races; as a rule, the cranial sutures coalesce much earlier and the teeth are more precocious.

Photography, though of undoubted service in craniometry, has been applied as a crucial test in the matter of identity and found wanting. It is objected to on the ground that it has no character of precision, and that photographs of the skull have the common defect of being central, not orthogonal projections, such as anthropometry requires. Besides, the lenses of cameras are not uniformly perfect. Anatomists know, moreover, that salient differences in any collection of crania prevent

methodical enumeration and constitute the stumbling-block of ethnic craniology. Cephalometry shows, further, that dolichocephalic, mesaticephalic, and brachycephalic skulls do not belong exclusively to the white, the yellow, or the black race, but exist among the three as a result of evolution.

On this subject Professor Lombroso, among the foremost contemporaneous medico-legal writers, cites the cranial asymmetry of Pericles, of Romagnosi, of Bichat, of Kant, of Chenevix, and of Dante, who presented an abnormal development of the left parietal bone and two osteomata on the frontal bone. Besides, there is the Neanderthaloid skull of Robert Bruce and the ultra-dolichocephaly noticeable in the skull of O'Connell, which contrasts with the mesocephaly of the Irish. The median occipital fossa is noticeable in the skull of Scarpa, while Volta's skull shows several characteristics which anthropologists consider to belong to the lower races, such as prominence of the styloid apophyses, simplicity of the coronal suture, traces of the median frontal suture, obtuse facial angle (73°), and moreover the remarkable cranial sclerosis, which at places attains a thickness of 16 mm. (five-eighths of an inch). Further mention is made of the submicrocephaly in Descartes, Tissot, Hoffman, Schumann, and others.

De Quatrefages noted the greatest degree of macrocephaly in a lunatic, the next in a man of genius. Cranial capacity in men of genius is usually above the average, having been found as high as 1,660 c.c. in Thackeray, 1,830 c.c. in Cuvier, and 2,012 c.c. in Tourgueneff. The capacity is often found above the average in insanity, but numerous exceptions occur in which it drops below the ordinary average, as in the submicrocephalic skulls of Liebig, Döllinger, Hausmann, Gambetta, Dante, and Shelley.

From what has just been said, it follows that skull measurements for medico-legal purposes have no more significance than the fact that some men are taller and some shorter than others. The medical jurist should, therefore, not be too dogmatic in drawing conclusions as to race from the skull alone. To complete the diagnosis in the matter of skeletal race peculiarity, the splay foot of the negro with the unusual backward projection of the heel-bone, as well as the greater relative length of the tibia and of the radius, may be taken into consideration. There are

other characteristics of the lower jaw and of the facial bones generally, the study of which leads up to the realm of transcendental anatomy; so their further consideration would hardly appeal to the "dispassionate, sympathetic, contemplative jury" of our enlightened countrymen.

Determination of Height or Stature.

When we have the entire skeleton to deal with, the height or stature may be determined with a reasonable degree of certainty by allowing from one to two inches for the soft parts. Most of the proportions given in works on artistic anatomy approach mathematical exactness. For instance, if both upper and lower extremities are extended after the manner of spokes in a wheel, and a point corresponding to the umbilicus be taken as a centre, the circumference of a circle described therefrom should touch the bottom of the feet and the tips of the middle fingers. When the arms are extended horizontally the line included in the middle-finger tips equals the height in the generality of men, although in exceptional cases it may vary. The negro giant, Nelson Pickett, is reported to have been eight feet four inches high, while his outstretched arms measured nine feet from tip to tip. Ordinarily the upper part of the symphysis pubis is the centre of the body. Some anatomists contend that this important point is really below the symphysis in the average man. The length of the foot about equals that of the head. According to Quetelet, its length is just one-ninth of the body in women, a little more than one-ninth in men. The conventional representation of the human foot with a second longer toe is, according to Professor Flower (see "Fashion in Deformity"), of negro origin and does not represent what is most usual in our race and time. Statistics of measurements made in England by several observers on hundreds of barefooted children fail to show one instance in which *the second toe is the longer.*[1]

Taken singly the bones may enable an approximate estimate of the height of the person when alive; but it should be remembered in connection with this subject that the height is not a

[1] See writer's article, "Feet," in "Reference Handbook of the Medical Sciences;" also, Ellis, T.S., "On the Human Foot," London, 1889.

fixed quantity, since it differs according to upright or recumbent position, also before and after a night's rest. Moreover, the alleged height of the deceased may have been taken in boots and is probably incorrect.

Many tables of measurements have been constructed for the purpose of determining the height from the dimensions of the bones; but the relation that exists between the total height and the dimensions of different bones varies according to age, sex, asymmetry, and individual peculiarities, hence the tables will not bear the critical examination that warrants their use with assured correctness, even in a majority of cases. The femur is the bone that gives the best results in these measurements. Isolated fragments have been included in the enumeration; the nose and the middle finger multiplied by 32 and by 19 or 20 giving the approximate height. While the foregoing calculations will not bear scientific scrutiny, they are of sufficient importance to be taken in connection with other facts in determining the probable length of the skeleton. Among the most trustworthy of these tables are those of Dr. Dwight, of Harvard University.

Determination of Age.

The age is a still more difficult matter to state precisely. Even during life one may be as much as ten years out in guessing the age of an adult, while the error may be from fifteen to twenty years in the case of a corpse. Dr. Tourdes mentions a case where the age was guessed as sixty and sixty-five in a deceased person aged eighty-five.

The state of the osseous system and the condition and number of the teeth, which strictly speaking are not bone, are among the surest guides in the determination of age. The signs furnished thereby may vary according to the periods of increase, maturity, and decline.

During fœtal life and even at the epoch of birth the bone centres are few. The distal end of the femur, the proximal end of the tibia, and the astragalus are ossified at birth. Points of ossification appear in successive order of development. The exact period at which the bones begin to ossify and the progress of bony union being detailed in standard works on anatomy, it would be superfluous to repeat them here. These

changes are, however, not absolutely certain as to time and order, as the tip of the acromion process of the scapula sometimes remains ununited throughout life; the ossification of the sternum and of the costal cartilages is very uncertain, while the teeth, like certain railway trains, are only due when they arrive.

From the character of the progress of consolidation of the skeleton the age may be estimated with a reasonable approach to accuracy up to twenty-five or thirty years, which is the stationary period as regards alteration in the osseous system. Above this period it is difficult to arrive at the age. About forty the cranial sutures[1] begin to disappear, although the time of the closure of the sutures varies within large limits; the coccyx becomes consolidated; ossification begins in the thyroid cartilage and in that of the first rib (although this state of the rib is regarded by many as pathological); the lower jaw, which in the fœtus and in infancy formed an obtuse angle, now assumes nearly a right angle. As senility progresses toward decrepitude, the bones become lighter and more brittle, owing to fatty atrophy, and their medullary canal larger; the jaw returns to its infantile shape from loss of teeth and atrophy of the alveolar processes; the bodies of the vertebræ (according to some authorities) bevel off in front; osteophytes are formed, and the neck of the femur approaches the horizontal. (See Abortion and Infanticide.)

Determination of Sex.

In the matter of sex there should be no difficulty, after noting the proof furnished by the aggregate characteristics of both male and female skeletons. The points of contrast between the two skeletons are not so striking before the age of puberty. Generally speaking the cranial capacity of an adult woman is less, although it is contended that since the great majority of males of the human species are taller, heavier, and larger than the females, it follows that if due allowance be made for these variations, it will appear that the brain capacity of woman is relatively very little, if at all, inferior to that of man. The mastoid processes of the female skull are smaller; the lower

[1] See Dwight: "The Closure of the Cranial Sutures as a Sign of Age," Boston Med. and Surg. Journal, April 29th, 1890.

jaw-bone is relatively smaller and lighter; the ribs are lighter and compressed; the spine is relatively longer; the collar and shoulder bones and the sternum[1] are smaller and lighter; there is a less pronounced angle in the femur, the neck of which approaches a right angle, while smallness of the patella in front and narrowness of the articulating surfaces of the tibia and femur, which in man form the lateral prominences, are said to make the knee-joint in women a sexual characteristic. But it is the striking contrast in the pelvis that furnishes a sexual significance that is of greater value than all the rest of the skeleton together. From a glance at the text-book account of the pelvis, it does not appear that much anatomical knowledge is necessary to identify the important points that give shape to the female pelvis. Its greater diameter (except the vertical), larger and more curved sacrum and coccyx, and great spread of the arch of the pubes are well-nigh incontestible signs. The differences as detailed in the books can be objected to only on the possibility of a so-called hermaphrodite pelvis in one of the other sex. We sometimes see a very large pelvis in a subject who by a teratological freak became a man. Masculine characteristics are, however, oftener found in women than feminine characteristics in men; hence the conclusion that the presence of feminine characteristics leaves but little doubt as to the sex, but that certain masculine indications, while giving a great probability for the male sex, are not absolutely decisive. (See Hermaphroditism.)

The finding of fœtal bones around or about the supposed female skeleton is suggestive. It could not be inferred from this fact alone that the woman was or was not pregnant at the time of death, since the absence of fœtal remains on the one hand might imply their entire decomposition in advance of those of the adult; on the other hand, the indiscriminate habit of undertakers, who often bury still-borns with adults, may account for their presence.

Accidental Signs and Evolution of the Teeth.

The trade or occupation leaves but few marks on the bones that are useful in the matter of identification. It is in the

[1] See Dwight: "The Sternum as an Index of Sex, Height, and Age," Journal of Anatomy and Physiology, vol. xxiv.

recent and well-preserved cadaver, or, better still, in the living subject, that the *professional signs* are of importance. As a rule, the relatively larger scapulæ point to the fact of a day-laborer; necrosis of the lower jaw suggests a worker in phosphorus; worn and discolored teeth a user of tobacco, and aurification of the teeth might suggest the previous social condition. Gold crowns and fillings and dental prosthesis generally are among the most common and, at the same time, among the most useful signs of identification. By this means the bones of persons killed by Indians on the Western plains have been recognized years afterward. The traveller Powell, massacred in Abyssinia, was recognized in this way. From the presence of artificial teeth and the mechanical appliances for fixing them, dentists may recognize their own work beyond a doubt. One of the most common-hackneyed of these cases is that of Professor Webster.[1] Later cases, in which this kind of proof established convincing and conclusive identification, are those of Dr. Cronin, assassinated in Chicago in 1889, and of the bomb-thrower, Norcross. Every now and then accounts appear in the daily press of corpses having been recognized by inspection of the teeth. In Washington, only a short time since, the remains of an unknown man were exhumed from the Potter's Field for judicial reasons. The unrecognized body had been found in the Potomac in an advanced stage of decomposition. From the signs furnished by the teeth the remains were identified as those of a person who had disappeared mysteriously and under circumstances that pointed to his having been murdered at a Virginian gambling den, and his body thrown into the river. In connection with this subject the Goss-Udderzook tragedy is of instructive interest.

In every important case a cast of the mouth should be taken, in order to set at rest any question that may subsequently arise as to the condition of the jaw, the absence of teeth, their irregularity or other dental peculiarities. A cast of the mouth of the deceased in the Hillmon case showed all the teeth to be regular and perfect, while it is alleged that Hillmon's teeth were just the opposite. External signs furnished by dentition may assist greatly in fixing both age and identity. The evolution of the human dental system has been so well studied

[1] Boston Med. and Surg. Journal, March, 1850, vol. xii., p. 162.

from intra-uterine life to old age that we may approximately tell the age, especially of children, from the teeth alone. This sign, so valuable in childhood, loses its value as the dentition progresses. Elaborate tables and dental formulæ to be found elsewhere deal with the two periods of dentition, the relative position and number of the teeth, and the like.

At birth the jaws show points of ossification only; but children are sometimes born with central incisors, as the writer has, in common with others, noted in several instances. The *first dentition* takes place from the seventh to the thirtieth month; the *second* between four and five years. In rachitic children these periods are later; but a syphilitic taint may hasten their development. The twenty-eight teeth characterize early youth. Wisdom teeth appear between eighteen and twenty-five, sometimes as late as thirty years. The presence of thirty-two teeth indicates maturity. This number is sometimes exceeded. Dr. Tidy, in his work on "Legal Medicine," reports having seen several children between six and seven years with forty-eight teeth. Instances are recorded of cutting the teeth at advanced age, seventy and one hundred and eighteen years; of adults who have never had teeth; of supernumerary teeth, and of a third dentition. What purported to be a third dentition came under my notice some years ago, in the person of an old negro "voodoo doctor." A more recent case, said to have occurred in an old man of seventy-four, at Seymour, Ind., is reported in the *Weekly Medical Review*, St. Louis, Mo., April 16th, 1892, p. 314.

The pathological signs furnished by the teeth should, of course, be looked upon as a personal characteristic that may lend additional light in the question of identity.

Congenital Peculiarities, Deformities, and Injuries.

But congenital peculiarities or injuries of other parts of the skeleton are studied to greater advantage in determining proof or disproof of identity. We may recognize cranial asymmetry; the peculiar conformation of the idiot skull; the prognathous skull of the negro; the pyramidal skull of some of the yellow races, and the oval head of the white man; besides the ethnic artificial deformities already touched upon in considering the

question of race. A metopic cranium, a cleft palate, a deformed spine or pelvis, a larger left scapula—indicative of left-handedness; a shortened extremity; bowed legs, club foot, the presence of extra fingers or toes, and the relative length of the fingers are each and all valuable facts in judiciary anthropology. In women of Spanish extraction the fifth finger is almost as long as the fourth—a fact so well known that glove-makers take advantage of it in sending gloves to Mexico, the Antilles, or to South America.

An estimate of the length of the hand seems to be a matter of difficulty, notwithstanding the extensive observation of high authority. In the majority of cases the ring-finger is longer than the index.

Important evidence is furnished from the existence of *injuries* such as fractures, whether old or recent; the marks of gunshot wounds, of trephining, amputation, excision, or other surgical operation on the bones. The remains of an old, ununited fracture in his left humerus enabled Sir William Fergusson to verify and settle all doubt as to the identity of the body of the great missionary and explorer, Dr. Livingston.[1] The existence of an injury may constitute evidence of great importance to the accused, as happened in the case of an English gentleman charged with murder, where the trial turned on the deposit of callus in a broken rib, the only bone produced in court. From the state of this callus there could be no doubt that the fracture must have been produced about eight or ten days before death, and could not have belonged to the deceased. There was, therefore, complete failure of the identity, and the accused was discharged.[2]

On the other hand, circumstances may arise in which the existence or not of an injury is a fact of great importance to the prosecution. Among other specimens in the Army Medical Museum at Washington, the bones of the forearm of Wirtz, executed for inhuman treatment of prisoners during the Civil War, show no remains or trace of fracture; yet it was claimed in defence at the trial that he could not have been guilty of the atrocities attributed to him, for the reason that this arm was disabled from a fracture.

[1] The British Medical Journal, April 18th, 1874, p. 527.

[2] Taylor's "Med. Jurisprudence," vol. i., p. 157.

Disease of the bones, whether hereditary or acquired, is an essential descriptive element in reconstituting individuality. Caries and necrosis, rickets, spinal disease, ankylosis, and other external manifestations of bone lesion may furnish pointers of such value as often to be incontestible. They are so evident as not to require detailed mention; but much care in such cases is necessary to distinguish between disease, decay, and violence, and artefacta. The last may have resulted from the axe or spade of the grave-digger or from post-mortem lesions made at the necropsy, as in the remains of the notorious Beau Hickman of Washington, whose body on being exhumed showed that sundry amputations and reamputations had been made on the principal limbs. Having died in a public hospital, the cadaver had been utilized in rehearsal of these operations previous to its burial in the Potter's Field..

Injuries of the phalanges, known as "baseball fingers," are valuable indications. This was one of the facts of identification in the celebrated Cronin case.

Duration of Burial.

The condition of the exhumed bones may throw some light on the question as to the probable length of time they have been under ground, as well as the probable cause of death. If the bones were entirely denuded of soft parts we should hardly expect them to be those of a corpse buried only three or four months previously. The noting of such an injury as a fracture inflicted by some sharp instrument on a skull found in a cesspool was sufficient, with other evidence of a general character, to convict a prisoner tried at the Derby Lent Assizes in 1847.

In all cases of the kind under consideration, special attention should be paid to the surroundings, every little detail of which should be noted with the utmost accuracy; for such articles as clothes, jewelry, buttons, and in fact anything that may furnish an inference,[1] may not only throw light on the identity of the person, but otherwise assist justice. Cases are recorded in which the identity has been established principally by the clothing found with the skeleton. In Taylor's "Medical

[1] Theatre-goers are familiar with the establishment of personal identity by means of traces of a perfume in the play of "Diplomacy."

Jurisprudence" a case is mentioned where the skeleton, portions of clothes, buttons, and boots of a Cornish miner were identified after twenty-six years' submersion in water. Somewhat similar circumstances, a few years ago, enabled the arctic explorer, Lieutenant Schwatka, and others to identify the remains of Lieutenant Irving, of the ill-fated Franklin party.

In exceptional circumstances, as that of great cold, for instance, organic remains may be preserved indefinitely. Visitors to the Junior United Service Club in London may remember the mammoth bones discovered in digging the foundation of the club-house. Accounts of remarkable preservation of bodies discovered a long time after the occurrence of Alpine accidents, and the finding of well-preserved mammoth remains in the Siberian ice, are matters of common knowledge. A few years since, in assisting to take the remains of a mammoth from an ice cliff in Escholtz Bay, Alaska, I came across the skull of a musk-ox and the rib of a reindeer which showed the deformity and callus of a united fracture, yet there are geological reasons for believing that thousands of years must have elapsed since these remains were entombed in the ice.

A precaution to be taken in judicial investigation of bones is to ascertain whether they belong to more than one body, as they may have been put together with a view to deceive. Each bone should be examined separately, to ascertain whether it is a right or left bone or belongs to the same skeleton. They should be put together with intelligence and care, and if incomplete parts of a skeleton they may be laid in sand or putty and photographed, or the medical man may go further and, Agassiz-like, reconstruct the skeleton from the fragments. In the case of a fracture the bones should be sawn longitudinally in order to study the callus.

THE HAIR AND NAILS.

Since the hair and nails resist decomposition an unusually long time, and are even believed to grow after somatic death, they may be considered as accessories of such value in the question that occupies us as to make it possible to verify certain characteristics regarding the remains of the cadaver even after years of inhumation. For instance, hypertrophy of the great

toe-nail, the length and color of the hair, baldness, or a long beard might furnish evidence of the best kind. Both hair and nails may, however, change after death. A case is mentioned[1] in which the hair changed from a dark brown to red after twenty years of burial. Accredited cases of the growth of hair after death are also on record. Dr. Caldwell, of Iowa, states that he was present in 1862 at the exhumation of a body which had been buried for four years. He found that the coffin had given at the joints and that the hair protruded through the openings. He had evidence to show that the deceased was shaved before burial, nevertheless the hair of the head measured eighteen inches, the whiskers eight inches, and the hair of the breast four to six inches.[2] Quite recently in unearthing the remains of an old cemetery in Washington, D. C., a number of persons noticed that when the body of a young girl, supposed to be about twelve or thirteen years of age, was taken up it was found that her hair had grown until it extended from her crown to her feet. Many careful observations seem to prove the molecular life of the hair and nails after somatic death. It suffices to quote the well-known case mentioned in Ogston's "Medical Jurisprudence," of several medical students who were brought to trial for having in custody the dead body of an idiot boy. When found on the dissecting-table the body was so disfigured that there was only one means left of proving its identity. The boy had a whim during life of permitting his nails to grow, and had not allowed them to be cut for many years previous to his death. They had completely curled round the tips of his fingers and toes till they had thus come to extend along the palmar and plantar surfaces in a strange way. The counsel for the prosecution availed himself of the knowledge of this fact, and his proof seemed to be complete, when a medical man came forward and gave in evidence that it was not an unusual circumstance for the nails to grow for several inches after death. This astounding statement so nonplussed the judge that the case was allowed to drop as not proven.

In exceptional cases the hair may be *green*. I saw a case some years since, for which no cause could be assigned, and only a few days ago I saw another in a man who worked in a

[1] New York Med. Journal, vol. x., p. 412.

[2] New York Med. Record, August 18th, 1877.

brass-foundry. At the Cronin trial a barber, who had counted the victim among his customers, recognized the shape of the head and texture of the hair. Subsequent evidence of medical experts was conclusive as to the identity of hair found clinging to a trunk, the hair cut from the head of the murdered man, and that of a single hair discovered on a cake of soap. This single strand, being lighter in color in some portions than in others, seemed to indicate that it could not have come from the head of the deceased, whose hair was brown. But it was shown that hair placed on soap or other alkaline substances becomes bleached in a manner similar to the color of a single thread. This evidence of vital importance linked the hair found in the trunk with that cut from Dr. Cronin's head, and went far toward proving that one of the murderers had washed his hands with the soap after the deed had been done.

Reviewing the signs furnished by the osseous system, it will be seen that the study of the skeleton alone is beyond contradiction more satisfactory and more important in establishing identity than that of all the other organs. Consequently a correct interpretation of the facts observed and judicious application of the rules deducible therefrom may in the matter of a human skeleton put its identity beyond a reasonable doubt. But the expert should remember that as no two cases are just alike, unexpected questions and unforeseen features may present themselves, giving to each case merits of its own. At best the medical man's conclusions will be probabilities, not certainties; therefore his expressions of opinion should be the more guarded, as upon it may hang the life of an innocent man.

IDENTIFICATION OF MUTILATED REMAINS.

Many of the foregoing remarks on the identity of the skeleton apply in cases where mutilated remains or a portion only of the body has been recovered. Circumstances often occur in which bodies may require identification after having been drowned and partly eaten by fishes or crabs, or after having been partly eaten by buzzards, or torn into fragments by animals, as has happened in the remains of a dead infant partly devoured by a dog, and in the case of a farmer who died in the woods and was subsequently eaten by his own hogs. After

accidents and fires where many persons perish; after a railway disaster where bodies have been mangled, drowned, burnt, and frozen, all in the same accident; or after an explosion from steam or gas or in a mine, or from gunpowder, dynamite, or other substance, the human remains are generally in such a state as to defy all attempts at recognition.

To dispose of a dead body in order to avoid detection, criminals will mutilate, disfigure, and chop into fragments the remains, which they afterward place in a trunk, a wardrobe, or throw into a sewer or other hiding-place. Scarcely a year passes that judiciary medicine is not concerned with cases of the kind. The frequency of such crimes has been attributed by some to the so-called contagion of murder; others offer the simple law of the series in explanation; others still believe that imitation is the principal cause. While there is no doubt a grain of truth in each of these, less philosophic minds will look upon such a beastly proceeding as a mark of the complete satisfaction sought by the destructive instinct.

Why such things should be is of less concern than the fact that criminal mutilation of the dead body is not confined to any age or country. Though more frequent in the last fifteen years, it takes up quite a space in the history of human cruelty. The violent passion, wrath, and vengeance that caused the prophet Isaiah to be sawn in two at the age of one hundred years by order of Manasses and Agag cut into pieces by Samuel have not materially changed in the days of Jack the Ripper; and we find such crimes in antipodal parts of the world, among varied sociological conditions, no matter whether it be the North American Indian, who scalps and mutilates his enemy and places the severed penis in the mouth, or the civilized European, who cuts up the body of his victim and serves it in a curry at a feast of assembled friends.[1]

This new point of judiciary medicine has lately been elaborated by European writers under the title of *Dépeçage Criminel*, a term which applies to the operation resorted to by an assassin having for its end the getting rid of the body of the victim and to render more difficult the establishment of its identity.

The cleverness of experts scarcely keeps pace nowadays

[1] Annales d'Hygiene Publique, 1883.

with the more complicated proceedings adopted by criminals. In fact, at a trial of this kind truth and science are often the under dogs in a fight, than which none in forensic medicine is longer and more embarrassing. To cause a rapid disappearance of the proofs of a homicide, with a view to escape the investigations of justice, murderers have been known literally to make hash of the victim which was subsequently eaten by themselves and others. Gruner relates the case of a man who, having killed and cut into pieces his victim, boiled and roasted the fragments and ate them with his wife. Such examples, however, suggest morbid rather than passional phenomena, which manifestly call for rigid scrutiny into the mental state of the culprit, who may be more of a lunatic than a malefactor.

In cases of infanticide new-born children are sometimes cut into pieces and the fragments burnt in order to facilitate the disappearance of the cadaver. There does not appear to be, however, any well-authenticated instance of the operation having been done on a living child. Generally the dismemberment is done in order to cause more ready disappearance of the remains.

The medico-legal problem to be solved in cases of criminal mutilation is to establish the identity of the victim and that of the author of the crime.

Many apparently trivial circumstances may assist in the formation of an opinion as to the identity of the culprit. If the victim be an adult, a man is the author of the deed; if an infant, a woman, the mother, is almost always the guilty one. The London *Lancet* (May 30th, 1863, p. 617) reports a case in which the body of a child, of apparently four to six months, was found in the sewage of a water-closet, minus an arm cut off below the shoulder, presumably that a vaccination-mark might not be adduced as evidence. A young woman was suspected. Several women deposed having seen a dusky-brown mother's mark near the child's navel. After steeping in pure water a portion of the skin said to include the mark, and after washing, the mark gradually reappeared at the end of three days, perfectly distinct. It was recognized by witnesses and produced at the trial as corroborative evidence. The accused was found guilty.

In a case of infanticide at Tarare, in 1884, the upper ex-

tremity of a fœtus was found to have been disarticulated after the manner of carving the wing of a fowl. This having suggested to Dr. Lacassagne a cook as the author of the crime, she was speedily discovered and convicted. A few years later an analogous case occurred in Florence and was reported by Dr. A. Montalti.

The instrument used for mutilating the body may furnish a suggestion of identity, to be dispelled or affirmed upon further investigation. The mode of section observed in various instances has led to the recognition of a butcher as the culprit. An expert would have but little trouble in distinguishing the hacking and mangling of a body from the careful cutting and preservation of muscles and blood-vessels in dissections made by medical students, whom the public, by the way, invariably suspect in cases of mutilation. If it can be ascertained that the instrument used was operated either by a left-handed person or by an ambidexter, such a fact may prove of importance. Sometimes the fragments are tied or sewn up in a package. The manner in which the knot is tied may indicate the occupation of the culprit. In one case the regularity of the sewing revealed that it was the work of a woman. Examination of the remains of clothing and of neighboring objects where the crime was committed may result in the identification of the victim or of the murderer. Indeed, it is the careful noting of trivial facts and their combination that is so valuable in all investigations of this class. A compound fact made up of minor facts, which considered severally would possess but little value, may sometimes solve the puzzle in a case where no single fact of conclusive value is obtainable.

Having collected as much of the mutilated remains as possible, the first step toward identification is to replace the pieces in anatomical order, to note carefully their correspondence or otherwise, and to ascertain whether the fragments belong to the same body or to two or several individuals. This is often a delicate and difficult matter, especially where decomposition is advanced or where the horror has been pushed to its utmost limits, as in the case of a fratricide committed in France by several persons, who fragmented the cadaver with a saw and hatchet; boiled the remains and fed them to hogs; and, after crushing the bones with a hammer, threw the fragments

into a deep gorge. Again, the body may be divided into numerous pieces, a hundred or more, and disposed of in widely different localities, as in a pond, a manure-heap, a river, or a cesspool. The chopped-up remains of infants have been boiled in lye and afterward thrown into a privy or put in a barrel of vinegar. A mother has also been known to cook with cabbage the dismembered remains of her six-months' child and serve it at a meal of which both she and her husband partook.

Numerous counterparts of such cases happening in late years could be cited where the object was to favor the disappearance of the cadaver, and in which the establishment of the identity turned on the examination of some small part of the organism; the uterus, the spermatic cord, the lobe of the ear, the hair, or the teeth furnishing a positive demonstration that led to judiciary results.

PUTREFACTION goes on very fast in a corpse that has been mutilated; but it is slower in parts which, on being separated just after death, have become bloodless in consequence of the hemorrhage. After submersion the outward signs of putrefaction put a notable obstacle in the way of identification, and after drowning the body becomes rapidly unrecognizable.

Supposing it impossible to reconstitute the cadaver in all its essential parts, it is always possible, by following the instructions already given for examining the skeleton, to infer from one or several parts of the cadaver the sex, age, height, and sometimes pathological peculiarities of the victim. Examination of the skeleton and teeth is of capital importance in an investigation of this class. The indications furnished thereby having already been touched upon, and being about all that we are justified in saying, it is only necessary to repeat that many of the details relative to these special indications are so confusing as to suggest caution in using the statistical tables of even high authority, as the observations they rest on are not of sufficient extent to deserve confidence.

A survey of the head, limbs, trunk, and genital parts will give the most useful indications. The HEAD, in fact, is the surest index for justice, and one that lends promptness in the discovery of the assassin. Typical illustrations of this occur in the Goss-Udderzook case and in the recent example of the bomb-thrower, Norcross. In the case of a woman murdered by

her husband at Antwerp in 1877 and cut into one hundred and fifty-three pieces and her remains thrown into a privy, the color of the hair, the lobule of a torn ear, and the uterus of a woman having had children furnished special signs that led to identity and condemnation. Examination of the *brain* and its membranes, though furnishing no very notable characteristics in the matter of identification, may nevertheless be regarded as a natural corollary to that of the skull. Brain weight, which is greatest between thirty and forty years, 1,200 to 1,450 grams in man, 1,100 to 1,500 in woman, diminishes toward the sixtieth year. It is said that the diminution takes place a few years sooner in the opposite sex. The estimated loss of weight in a person of eighty years is admitted to be from 90 to 150 grams. Another sign of age is the tendency to degeneration found in the pineal gland, the cortical substance, the optic and striate thalami, and in the brain capillaries.

The state of the eyes, if not too decomposed, may still become a sign of identity. For instance, the color of the iris, an arcus senilis, a pterygium, a cataract or an operation for the same, an iridectomy, etc., are signs that occasion may utilize.

The TRUNK may show, as it has in several instances, incised wounds that caused death before the mutilation. Besides, the organs therein contained may by their weight, dimension, and tissue alteration indicate the progress of age and of degeneration. Modifications of the circulatory and respiratory apparatus are obviously characteristic. As age advances the only organ whose weight increases with the number of years, the heart, may become hypertrophied or dilated; its coronary arteries may undergo an alteration; the pericardium thickens, and in fact arterial atheroma and degeneration generally may begin between thirty-five and forty years. It should, however, be borne in mind that these signs of senility may come much later or even not at all. In a man of eighty-four years Tourdes found no notable tissue lesion; in another of one hundred and four Lobstein found no trace of ossification of the arteries of the trunk and upper extremities, and in Thomas Parr, aged one hundred and fifty-two years, Harvey found absolutely no lesion of this kind. Although toward eighty years the heart increases in weight in both sexes, the opposite has been observed in exceptional cases. Placing the average weight of this organ

in the adult at 266 grams for men, 220 for women, it will be found that progress in weight gives toward the eightieth year an increase of 90 grams for men and 60 for women. Yet a case of cardiac atrophy is reported in a woman of eighty whose heart weighed but 170 grams.

Diminished weight of the lungs becomes accentuated with years. Especially is this the case after pseudo-melanosis and senile emphysema. The state of the lungs of stone-cutters and miners and various thoracic and abdominal diseases may likewise become signs of identity. A cirrhosed liver, an enlarged spleen, a senile kidney, and the like, are sufficiently obvious in their bearings on this question.

Like the trunk, the ARMS AND LEGS, in cases of the class under consideration, show but few traces of disfigurement other than the fact of their having been disjointed. The manner in which the sections were made and the proceedings employed for the disarticulation would equally affirm an experienced hand or the reverse. Such facts have of late years assisted in the discovery and condemnation both of a farmer and of a medical student, and also in the case of the cook already mentioned, who cut off her child's arm after the manner of carving the wing of a fowl. The existence of deformity, injury, and disease in the limbs should, of course, claim attention, but their relativity in an investigation of the kind is too apparent to require further comment.

Mutilation of the GENITAL ORGANS is not so common. Persons familiar with border warfare have observed the savage custom of cutting off the victim's penis and placing it in his mouth. In more civilized communities the culprits are generally women in whom hatred and ferocity prompt an act that marks the evident satisfaction sought by the destructive instinct. Sometimes, however, the genital organs have been cut from the cadaver of a woman, presumably for the purpose of concealing traces of rape that may have preceded the murder. The signs furnished by the female genital organs as to virginity, maternity, and the menopause are so easily demonstrated at the necropsy as to become positive proofs of identity. The uterus loses both in size and weight with age. This along with hard, atrophied, and germless ovaries attests the stoppage of menstruation. The question of identity may turn on the age

at which menstruation ceases, as happened in an action of ejectment in the case of Doe on the demise of Clark *vs.* Tatom. The period known as change of life, when the uterus and ovaries lose their function, though placed at forty-five and fifty years, is quite uncertain. In spite of *averages*, menstruation is occasionally continued to seventy and upward.[1]

The signs furnished by the genital organs of the male are of less importance. Atrophy and diminished weight of the testicles and rarity or absence of the spermatozoids are indications of senility; although spermatozoids have been observed at ninety-four years. The structure of the spermatic cord at different periods of life from the last of intra-uterine to the first of extra-uterine life, in puberty, and in old age, is accompanied by characteristic modifications of development and regression, which are of interest on the question of medico-forensic diagnosis of identity, as shown by Dr. Pellacani.[2]

Congenital deformity of the genital parts, as epispadias or hypospadias; marks of circumcision, useful in India to identify Mussulmans above eleven years; traces of disease that may have left extensive cicatrices, as phagadenic chancre, suppurating buboes, etc., may also furnish characteristics of evidential value.

ENTIRE CADAVER DEAD BUT A SHORT TIME.

In the case of a body that has been dead a short time only, recognition from the features, even by the nearest relatives, is often a matter of the greatest difficulty. The change produced in the color and form of the body, especially after drowning, is a formidable obstacle to identification by likeness and general type of face. Pages could be filled with the mere mention of the multiplied instances of mistaken identity of the living, many of whom have been punished because they had the misfortune to resemble some one else. How much more careful, then, should be the medical examination of the remains in the progress of decay, with the distortion and discoloration of the features, and the consequent change or destruction of the peculiar expression of the countenance by which human features are usually distinguished and identified.

[1] Med. Gazette, vol. xli., p. 650.

[2] In a series of papers to Riv. Sper. di freniat, Reggio-Emilia, 1883.

Among the innumerable instances of mistaken personal identity and cases of resemblance mentioned in history and fable, from the time of Ulysses down to the days of Rip Van Winkle's dog Schneider, it appears that this animal is credited with more sagacity than man in the matter of recognizing his master even after years of absence. Indeed, recognition by animals may be considered a proof of identity. Many persons can recall instances of the kind, though perhaps not so dramatic as the one of the dog in the Odyssey, who recognized his master after twenty years of absence and died immediately thereafter.

As a matter of fact, time and circumstances will so alter resemblance as to account for some of these most striking proofs of the fallibility of human testimony that we see illustrated in chapters on mistaken identity. We easily forget the true image of persons and things, and time promptly modifies them. The evidence of the senses may be so little trusted in this regard that father, mother, husband, and nurse may attest a false identity in the case of their own children. A nurse has been known to testify to the identity of the severed head of a woman whom thirteen other persons were sure they recognized from characteristic signs, when the supposed victim put in an appearance and thus attested her own existence. The head of the unrecognized victim of this strange controversy is preserved in the museum of the Strassburg Faculty.

In another case of historical notoriety in France, forty witnesses on each side swore to the personality; while in the celebrated Tichbourne trial no less than eighty-five witnesses maintained positively, under the most rigid and scrutinizing cross-examination, that a certain person was Sir Roger Charles Doughty Tichbourne, a baronet; at the same time a corresponding number were equally unshaken in their conviction that he was a Wapping butcher, Arthur Orton.

Resemblances often bring about remarkable coincidences. A case is said to have occurred in Covington, Ky., where two men met, each the double of the other in form, stature, and feature, each having lost a right leg, amputated at the knee, and each being blind in the left eye from accident.

Puzzle and perplexity are not confined to remarkable cases and judicial errors; for so many people are unskilled in correct

observation that it is a matter of common occurrence for two individuals to be mistaken the one for the other. The writer for some years has frequently been mistaken for a certain naval officer he is said to resemble, while the officer in question has become so accustomed to being called "Doctor" that he answers to the title without protest.

A case that has of late been much quoted in the journals is that of Tiggs. What was supposed to be his mangled body was identified by his wife, and further identification was forthcoming from one of his children and the employer of the deceased. The coroner had granted a certificate for burial, and as the hearse neared the door, to the surprise of all parties the real Tiggs entered the house and gave a satisfactory account of his absence.

Most mistakes of this kind are the result of existing imperfections in the average human mind or in its use. So few people are skilled in minute observation that Lord Mansfield's dictum regarding the "likeness as an argument of a child being the son of a parent" should be received with a certain degree of reserve, especially in the question of identity from likeness after death. In Ogston's "Medical Jurisprudence" a case is related of a father who could not recognize the body of his son drowned at sea ten days previously. The mother, however, identified her boy from the existence of two pimple-looking projections on the front of the chest, which proved to be supplementary mammæ.

As a rule, the changes in the face and countenance two weeks after death are such that it is well-nigh impossible to establish identity from the features alone. Yet in exceptional cases the external results of putrefactive decomposition have been so delayed or modified as to produce very small changes in the features even after many years of burial. Bodies have been known to retain a remarkable state of preservation for long periods in such circumstances as burial in a peat bog, in the sand of the desert, and in the frozen ground of cold countries.

Even *photography* in the matter of identity is not to be trusted. Though an important accessory to other evidence, it is often, and very properly, objected to by lawyers on the ground of being incompetent, irrelevant, and immaterial. The

picture presented for comparison may not be an original one or it may have been taken years previously. The difficulty in recognizing one's own most intimate friends from pictures taken only a few years back is a matter of common knowledge. Besides, the negative from which the picture was taken may have been retouched or altered, consequently it would not be the same as produced by the camera, and is, therefore, valueless as evidence. It is held to be incompetent to prove a photograph by merely asking a witness whether or not he recognizes the picture in question as that of a certain person.

In all cases where photographic pictures are required in a court of law the authorities are that the artist who took the picture must be produced and show that he took the picture, and that it is a correct representation of the original of which it claims to be a picture. If possible the negatives themselves should be called for and reproduced. Dr. Tidy states that he has known a volume of smoke appear in a print as issuing from a chimney, and used as evidence of the existence of a nuisance, when no smoke existed in the original negative. Only slight familiarity with the method of taking photographic pictures and the chemistry involved in the process suffices to show that many little details of sensitizing, exposing, developing, and printing greatly change the general appearance of the face. Some of the tricks that may be played with photography, illustrating its comparative incompetency as evidence in the matter of personal identification, I have seen in a series of pictures at the Department of Justice in Washington. All were photographs of the same person taken in such varying circumstances that no two are alike or recognizable as the same person, until scrutiny is brought to bear on the profile of the nose.[1] In considering photography in its bearing on this branch of medicine, it must also be borne in mind that a certain degree of imperfection arises from want of uniformity in the lenses of cameras. I have already mentioned the want of precision in photographing the skull, the common defect being central not orthogonal projection such as anthropometry requires.

[1] See Mr. Galton's paper in Nature, June 21st, 1888, p. 173; also in his recent work on Finger Prints.

SURFACE SIGNS OF IDENTITY.

Examination of the surface of the skin and of its appendages may in certain cases take decisive importance. Valuable medical proof is often furnished by scars, nævi, growths on the skin, pock-marks, traces of skin disease or of scrofula, and by the so-called professional stigmata which would suggest the trade, character of work, or occupation of the deceased. Thus cigarette-stains on the fingers of smokers, or silver-stains on the hands of photographers, the horny palm of the laborer, or the soft, delicate hand of one not accustomed to work, would be indicative. The alterations in the hand make it, so to speak, the seat of election; for in the majority of trades that may be mentioned it is the hand alone that bears the principal marks of daily work that indicate the calling. A case is recorded of a person who previously to his assassination was lame and walked with a crutch. Although the body was cut into fragments, an examination revealed in the palm of the hands characteristic callosities, showing prolonged use of support of this kind. In another instance of criminal mutilation a tattoo-mark found on the arm proved an overwhelming charge against the assassin and drew forth his confession. An accused was also convicted of murder after establishing the only missing link, the question of identity, which turned on the finding of cupping-marks and a tattoo on the body of the murdered man. Personal identity of the bodies of infants has, moreover, been proved by means of a small blister; by a patch of downy hair; by the similarity existing between two pieces of thread used to tie the umbilical cord; and by the severed end of that part of the funis attached to the infant fitting precisely to the corresponding portion attached to the after-birth. In addition to these a methodical examination may put in evidence other facts that may be derived from diverse influences that leave characteristic traces.

SIGNS FURNISHED BY MARKS, SCARS, STAINS, ETC., ON THE SKIN.

But of all the surface signs, whether congenital or acquired, that may throw light on the antecedents of the decedent, birth-marks, freckles, cicatrices, tattooes, and the professional signs

furnish the best indications. Birth-marks (*nævi materni*), from their supposed indelibility, have given rise to discussion at many celebrated trials. As a rule, these marks are permanent and seldom lose their distinctness, though in exceptional cases they may undergo atrophy in the first years of life. Hence testimony as to the existence of birth-marks may often be uncertain when it has reference to a period a long way back. In a recorded case of supposed recognition of a person having a mark of this kind on her face, the alleged victim turned up and established her identity as well as the fact that she did not have the birth-mark attributed to her.

Before the introduction of the electrolytic method it was customary to resort to cauterization, excision, vaccination, and tattooing the pigmentary spot in order to modify or remove these congenital marks. Such proceedings usually left more or less of an indelible scar which occasion might utilize in the matter of medico-legal diagnosis. The traces of nævi may, however, be entirely removed by electrolysis. I have recently seen a nævus of large dimension on the face of a young woman so completely destroyed as to leave no trace of the operation.

The *possibility of the disappearance of a scar* in such circumstances depends here, as it does in other instances, on the depth of the wound. A cicatrix being the result of a solution of continuity in the derma, the question arises whether a wound that has divided the derma without loss of substance and healed by first intention leaves any perceptible scar. Some are of the opinion that a cicatricial line persists, but grows fainter with time. Histological examination in a question of this kind might prove conclusive by showing the structure of the fibro-cellular tissue that constitutes the cicatrix. In the case of very superficial burns or wounds, the scar may completely disappear if the epidermis alone or the superficial part of the derma is attacked; on the other hand, if there has been long suppuration or loss of substance from ulcers, chancres, or buboes, especially on the neck, groins, legs, or genital parts, traces of their lesion will be found. It may, therefore, be asserted as a general rule that all scars resulting from wounds and from skin diseases which involve any loss of substance are *indelible*. A scar on the face is one of the points at issue in the celebrated Hillmon case already mentioned.

As the matter of cicatrices is treated in the section on WOUNDS, further mention here would be superfluous.

TATTOOING.

Of all the scars that speak, none in judiciary medicine affords better signs of identity by their permanency and durable character and the difficulty of causing their disappearance than those furnished by tattoo-marks.

The custom of tattooing having existed from the earliest historical epochs is of interest not only from an ethnological but from a medical and pathological point of view, while it is of great importance in its relation to medical jurisprudence in cases of contested personal identification which may be either established or refuted by this sign. So trustworthy is it in many instances as to become a veritable ideograph that may indicate the personal antecedents, vocation, social state, certain events of one's life, and even their date.

Without going into the history of a subject mentioned by Hippocrates, Plato, Cæsar, and Cicero, it may be pertinent to say that tattooing is prohibited by the Bible (Leviticus xix., 28) and is condemned by the Fathers of the Church, Tertullian among others, who gives the following rather singular reason for interdicting its use among women: "*Certum sumus Spiritum Sanctum magis masculis tale aliquid subscribere potuisse si feminis subscripsisset.*" (*De Virginibus* velandis. Lutetiæ Parisorum, 1675, f°, p. 178.)

In addition to much that has been written by French, German,[1] and Italian authors, who have put tattooing in an important place in legal medicine, the matter of tattoo-marks a few years since claimed the attention of the law courts of England, the Chief Justice, Cockburn, in the Tichbourne case, having described this species of evidence as of "vital importance," and in itself final and conclusive. This celebrated trial has brought to light about all the knowledge that can be used in the investigation of this sign as a mark of identity. Absence of the tattoo-marks in this case justified the jury in their finding that the defendant was not and could not be Roger

[1] For a few classical citations that are more erudite than profitable see Zeitschrift für Ethnologie, Berlin, 1888, xx., p..412.

Tichbourne, whereupon the alleged claimant was proved to be an impostor, found guilty of perjury, and sentenced to penal servitude.[1]

The practice of tattooing is found pretty much over the world, notably in the Polynesian Islands and in some parts of Japan. It is, however, not found in Russia, being contrary to the superstitions of the people, who regard a mark of this kind as an alliance or contract with evil spirits. Its use appears to be penal only, and is limited to Siberian convicts. The degrading habit, confined to a low order of development, exists at the present time as a survival of a superstitious practice of paganism, probably owing to perversion of the sexual instinct, and is still common among school-boys, sailors, soldiers, criminals, and the lowest order of prostitutes living in so-called civilized communities. Indeed, unanimity of opinion among medical and anthropological writers assigns erotic passion as the most frequent cause of tattooing, and shows the constant connection between tattoo-marks and crime. Penal statistics show the greater number of tattooed criminals among the lowest order, as those who have committed crimes against the person; while the fewest are found among swindlers and forgers, the most intelligent class of criminals. Even amid intellectual advancement and æsthetic sensibility far in advance of the primitive man, such as exists in London and New York, for instance, are to be found persons who make good incomes by catering to this depraved taste for savage ornamentation. Persons who have been to Jerusalem may remember the tattooers, who try to induce travellers to have a cross tattooed on the arm as a souvenir of the pilgrimage. If a writer in the *Revue des Deux Mondes*, 15th June, 1881, is to be believed, it appears that the Prince of Wales on his journey to the Holy Land had a Jerusalem Cross tattooed on his arm, April 2d, 1862. The "Cruise of the *Bacchante*" also tells how the Duke of York was tattooed while in Japan.

The process is now rapidly done, an Edison electric pen being utilized for the purpose, and some of the wretched mar-

[1] See "Guy's Hospital Report," xix., 1874; also "Histoire Médicale de Tatouage" in Archiv. de Médecine Navale, tom. 11, 12, Paris, 1869. A later study on the medico-legal importance of tattooing may be found in Lo Spallanzani, Roma, 1891, 2s, xx., 169, 208.

tyrs have the hardihood to be tattooed from head to foot with grotesque designs in several colors. I know of several instances: one of a man in Providence, R. I.; another of a Portuguese barber, who has striped poles, razors, brushes, and other emblems of his calling over the entire body. Another man has likenesses of Abe Lincoln and of Kaiser Wilhelm of Germany on his respective shins. A Nova Scotian, tattooed from head to foot, has among other designs that of "St. George and the Dragon" on his back; while a Texas ranchman, six feet two inches tall, underwent the torture of eight weeks' profanation of his body in order to appear in blue, brown, and red, with an irreverent image on his back of the Immaculate Conception and thirty-one angels.[1]

A singular mixture of erotic and religious emblems is often found among the varied and fantastic signs used in tattooing. I recall the case of a man who had represented on his back a fox-hunt, in which riders followed the hounds in full pursuit of a fox about to take cover in the anus. In another case of a man accused of criminal attempt on two little girls, examination of the sexual organs revealed a tattoo on the back of the penis representing the devil with horns and red cheeks and lips. When the little girls were asked if the accused had shown them his virile member, they answered, "This man unbuttoned himself and said to us: 'I am going to make you see the devil.'" In the face of such affirmations, the accused confessed his crime and was condemned. Other tattoo signs of the grossest emblems of unnatural passion have been found among low prostitutes, pederasts, and tribades.

Statistics founded on numerous facts show many cases of tattooing of the penis and even of the labia majora in the lowest order of prostitutes, but these unclean images and revelations of lustful instinct do not occur in the same order of frequency as those noted on the forearm, the deltoid, or the inferior extremities. So valuable are these marks in their bearing on the class, vocation, character, and tastes of a person that the finding of anchors and ships would indicate a sailor; while flags, sabres, cannon, and other warlike signs would indicate a

[1] According to Lombroso, all who are tattooed on the back or the sexual organs have without exception either been among the Pacific Islands or sojourned in a prison.

soldier, etc. It is also noticeable that in the tattooing practised by lunatics the image relates in some way to the nature of the peculiar form of mental disease from which they suffer, and it is chiefly among the more severe and incurable cases of mental degeneration that these signs are found. (See Dr. Riva's article, "Il tatuaggio nel Manicomio d'Ancona," *Cronica del Manicomio d'Ancona*, November, 1888.)

Almost always the motive that prompts these disfigurements of the skin is the result of impulse, of thoughtlessness, or of orgy, and almost all the tattooed come to repent of their folly. The subject of *détatouage* has of late taken a polemic turn in some of the Continental journals. There are besides many cases on record of severe accidents and complications following the operation, such as severe inflammation, erysipelas, abscess, and gangrene. Dr. Beuchon gives statistics of forty-seven cases, in which four were followed by mutilation and eight by death either directly or in consequence of an amputation. A certain proportion of what is known as *syphilis insontium* is to be found among the reported statistics of tattooing. Dr. Bispham, of Philadelphia, informs me that while at Blockley Hospital he saw thirty cases of syphilis that had been communicated by the same tattooer.

Tattooing may sometimes be *accidental*. I have seen a departmental clerk with an elongated tattoo on the back of his hand caused by accidental wounding with an inked pen. A bursting shell during a naval engagement has caused a characteristic tattoo on the face of a well-known officer to be seen any day in Washington. Two cases of the bluish-black discoloration of the skin from taking nitrate of silver have also come under my observation. Both occurred in medical men, one of whom lives in Florida, the other in the District of Columbia. Silver discolorations of this kind are indelible, but I learn from one of these gentlemen that large doses of iodide of potassium cause temporary fading of the discoloration, which returns on stopping the medicine.[1]

The *indelibility of tattoo-marks* is such that their traces may be easily recognized in the cadaver, though in a somewhat

[1] A paper by Dr. J. N. Hall on "The Medico-Legal Value of Powder-Stains in Gunshot Wounds," with a report of cases, may be found in the Transactions of the Colorado Medical Society, 1890, xx., 94.

advanced stage of putrefaction. They have even been recognized on a gangrenous limb. Sometimes, however, it is impossible to recognize at first sight whether there has or has not been a tattoo. A strong light and a magnifying glass and a microscopic examination of the neighboring ganglia to detect the presence of coloring matter may assist in removing doubt. It has been found on the bodies of tattooed cadavers that the ganglia are filled with grains of coloring matter of the same nature as that employed in making the tattoo. Attempts to remove tattoo-marks generally leave a vicious scar that is equally indelible. An efficacious method is to tattoo the mark with a solution of tannin, which is followed by brushing over with nitrate of silver. A red cicatrix follows, and when the epidermis separates the tattoo disappears. A better method, however, is by means of the electric needle already mentioned in speaking of the electrolysis of nævi.

That *a tattoo-mark may disappear* by the effects of time and leave no trace is a matter that Cooper reports after examining the mutilated remains of a cadaver, and the statistics of Caspar, Tardieu, and Hutin place it as high as nine in the hundred. An officer of the United States Revenue Marine lately called my attention to several superficial tattooes on the back of his hand which had disappeared. The deeper ones, however, remained. The *spontaneous disappearance of a tattoo* seems to be possible when the operation has been done in such a superficial way as not to have passed the rete Malpighii, or when the tattooing has been done with some substance not very tenacious, as vermilion, which appears to be easily eliminated. But when the particles of coloring matter penetrate into the fibro-elastic tissue of the derma, the disappearance of the tattoo is rare.

In seventy-eight individuals tattooed with vermilion alone, Hutin found eleven upon whom the tattoo had disappeared. Out of one hundred and four tattooes made with a single color, India-ink, writing ink, blue or back, not a single one had completely disappeared. The results are identical if the tattooes are made with two colors. Thus in 153 tattooes with vermilion and India-ink, one instance showed a fading of the black, in another it had completely disappeared, the red being well marked; twenty times the red was partly effaced, the black

being well marked; and in sixteen cases the red had completely disappeared, the black remaining visible.[1]

A tattoo-mark may sometimes be altered, in which case it proves deceptive as an index. A workman changing his trade seeks to transform the insignia of his first calling into those of the second, or a criminal in order to avoid identity will make a change. In the former instance the transformation is not difficult to detect, but in the latter so much care is required to recognize the change that penal science has relegated the sign to a secondary place.

As to the length of time since a tattoo-mark has been executed, authorities are that it is impossible to tell after two or three weeks. Whether a tattoo-mark is real or feigned is easily settled by simply washing the part. This question, as well as that of the judicial consequences of such marks, is hardly pertinent to the matter in hand.

Value of Professional Stigmata.

The so-called professional signs are of undoubted value in the surface examination for establishing identity, but it does not seem that their importance warrants the extreme prolixity given to them by some Continental writers, and even by one in the city of Mexico, Dr. José Ramos.[2] For instance, it is pretended that cataract is more common among jewellers because of the fineness of their work; yet out of 952 cataracts, of which a record has been kept, only two cases occurred in jewellers. Besides, there is not one special sign or physical trace left on the body by which a prostitute may be known, notwithstanding the fact that in life the collective appearance would seldom deceive an experienced man.

Only in the case of sodomy, where anal coitus has been frequent, would characteristic signs be found. On anal examination of 446 prostitutes, Dr. Coutagne[3] found the signs of post-perineal coitus in 180. He cites the case of a young prostitute presenting the astonishing contrast of a gaping anus surrounded by characteristic rhagades, with the genital parts of an extreme freshness, a very narrow vagina, and non-

[1] Bulletin de l'Acad. de Méd., 17 janvier, 1853, t. xviii., p. 348.

[2] La Escula de Medicina, Mexico, 1880–81.

[3] Lyon Médical, 1880.

retracted hymen, constituting by their reunion a still firm ring. A fact yet more curious is shown by a specimen in the collection of the museum of the laboratory of legal medicine at Lyons. The genital organs of the cadaver of a woman of twenty-eight or thirty years showed a hymen intact and firm, but on examining the anal region it was surprising to find an infundibuliform deformity with all the signs of sodomitical habits, which of course rectified the opinion that had been made regarding the chastity of this woman.

Many of the signs enumerated as peculiar to different callings have no special anatomical characteristic that is easy to distinguish with precision, consequently they do not present a degree of certainty or constancy sufficient to be invoked as strong medico-legal proof of identity. Moreover, the effects of time or treatment may have caused alteration or disappearance of many of the signs in question, which would at best be of negative rather than of absolute value.

To arrive at an impartial appreciation of the relative value of the professional stigmata as signs of identity, a certain number of the signs should be thrown aside as illusory. Others, on the contrary, are durable, special, and constant, and assist in establishing the identity accordingly as the lesions or alterations are complete or evident; but it should be borne in mind that the physical alterations and chemical modifications resulting from the exercise of certain trades are not in our country so important from a medico-legal point of view as they are in Europe, where class distinctions are more defined.

VALUE OF STAINS AND DIFFERENT IMPRINTS.

In the same manner that a very small portion or fragment of the human body may suffice to establish the *corpus delicti*, so will minute remains or traces, as finger-marks, footprints, and other material surroundings, even smells or traces of perfume, be of great assistance to justice in determining the identity of both culprit and victim, and at the same time throw light on the attendant circumstances of the deed. The traces of a bloody hand or foot, smears of tar or paint, the various spots or stains found on fabrics, instruments, etc., may involve questions of great nicety the relativity of which is apparent,

especially in criminal trials. Newspapers have familiarized the public with many cases of the kind, in which medical experts have demonstrated blood and other stains with sufficient accuracy and positiveness to satisfy a jury. The Cronin case is a notable instance.

IMPRINTS MADE BY FINGER-TIPS are known to be singularly persistent. In four specimens of inked digit marks of Sir William Herschel, made in the years 1860, 1874, 1885, and 1888 respectively, though there was a difference of twenty-eight years between the first and last, no difference could be perceived between the impressions. The forms of the spirals remained the same, not only in general character, but in minute and measurable details, as in the distances from the centre of the spiral and in the direction at which each new ridge took its rise. Sir William Herschel has made great use of digit-marks for the purposes of legal attestation among natives of India.[1] The extraordinary persistence of the papillary ridges on the inner surface of the hands throughout life has been a theme of discussion by the Royal Society,[2] and Mr. Galton has devised a method of indexing finger-marks.[3]

The IMPRESS OF A NAKED FOOT covered with blood may serve to direct the investigations of justice. In a criminal affair in France, where eight individuals were implicated, comparative experiments upon the identity of the foot, made with a view to determine to which of the individuals ought to be attributed the bloody footprints found near a wardrobe, it was shown that a degree of recognition could be established on reproducing the footprints with defibrinated blood. From the eight imprints of the left foot of each individual, impregnated with blood, measures and comparisons could be made, thus helping to establish the difference or the resemblance with those found near the wardrobe.

Imprints thus obtained may be looked upon as a kind of documentary evidence, but too much importance should not be attached to them as articles tending to prove criminality. The futility of such evidence is shown in the varying sizes of different impressions of the foot of the same person—first in rapid

[1] Med. Press and Circular, May 30th, 1888, p. 576.

[2] Phil. Trans., B., 1891.

[3] See Proc. Royal Soc., London, May 28th, 1891. A medico-legal study of imprints may also be found in Archiv d'Anthropologie Criminel, 15th July, 1891.

progression, secondly by standing, and third by slow advance. The results appear less sure in the case of footprints made in mud, sand, dust, or snow. Nevertheless many facts relating thereto may be noted with great certainty. The question has been mooted as to whether or not the impress left upon the soil gives always the exact dimensions of the foot that has made them. One side has contended that the footprints *are a little smaller*, while the other refutes this opinion and thinks that they are *a little larger*. The consistency of the soil, which does not seem to have entered into the discussion, doubtless accounts for the small differences that have given rise to this discrepancy of opinion. The outline of the sole of the foot and the relative position of the toes are more or less neatly designed as the ground is more or less wet or soft. The means employed for taking impressions of foot or other tracks in mud, etc., show considerable ingenuity on the part of those who have elaborated the subject. To discover foot-marks in mud, powdered stearic acid is spread over the imprint and a heat of at least 212° is applied from above. By this means a solid mould may be taken of the imprint. These researches have been extended to the exact reproduction of imprints left upon snow by pouring melted gelatine upon the imprint previously sprinkled with a little common table salt, which rapidly lowers the temperature of the snow about fifteen degrees and permits the mould to be taken without too much hurry. The study has been extended to the configuration of the plantar imprints in tabetics, but it does not appear so far to be of much medico-legal value.

The question may arise as to the length of time since the imprints were made. This would, of course, depend upon many circumstances, as weather, temperature, and the like. It is a fact that in Greenland footsteps in snow have been recognized many months after they were made. A few summers ago, on an arctic expedition, I climbed Cape Lisbourne, Alaska, in company with another person. The ground being thawed in many places, our feet left very decided imprints in the mud. A year afterward I visited the same spot, and on again making the ascent was astonished to recognize the footsteps made the year before.

Circumstances sometimes direct expert attention to vestiges

of other animals. The tracks of a dog or of a horse may become the object of a medico-legal inquest. The books record a case in which it was necessary to ascertain whether a bite had been made by a large or a small dog. This question was settled by producing the dogs and comparing their teeth with the scars. Persons familiar with border life know the importance of trails and the minute observation that is brought to bear on them by the experienced frontiersman. In following cattle-thieves and murderers, while with the Fourth United States Cavalry on the Rio Grande frontier, I have known the peculiarity of a horse's footprint in the prairie to tell a tale of great significance.

Observation in this respect may extend to such apparently trivial objects as the tracks of wheels, as those of a wagon, a wheelbarrow, or a bicycle, or to the singular imprints left by crutches or a walking-stick. The imprint left in the ground by a cane usually occurs in the remarkable order of every two and a half or every four and a half steps. Investigation of such circumstances may result in material facts that may be of great assistance in establishing the relation of one or several persons with some particular act.

DEFORMITIES AND PATHOLOGICAL PECULIARITIES.

The existence of deformities or injuries is so apparent in serving to establish identity that it seems almost superfluous to mention them, except for the purpose of deciding whether the wounds were made during life or after death. In the matter of gunshot wounds on persons who took part in the late Civil War, many of whom unfortunately belong to the vagrant class and are often found dead, their wounds sometimes afford excellent means of identification. In many instances the multiple character of these wounds is almost incredible. When on duty at the Army Medical Museum, in connection with the preparation of the "Medical and Surgical History of the War of the Rebellion," I saw a man who was literally wounded from the crown of his head to the sole of his foot, the scars being fifty-two in number.

WOUNDS MADE DURING LIFE might show the suggillation peculiar to bruises or traces of inflammation. Besides, the gaping nature of the lips of the wound, the fact of hemorrhage

having taken place and the coagulation of the blood, the infiltration of blood into the cellular tissue, etc., are surgical facts that would leave but little doubt as to the infliction of the wounds during life.

The *cause of death* is often a difficult matter to determine, as it may have been accidental, suicidal, or the result of homicide. The causes relating thereto are, moreover, so many and varied that space and time compel a reference to other headings of this work. In forming an opinion as to *the probable date of death* the extent of putrefaction is the chief guide. If death is quite recent, we may be guided by the post-mortem rigidity or the extent to which the body has cooled. The march of putrefactive decomposition would, of course, be regulated by circumstances. It takes place very rapidly in persons who have succumbed to excessive fatigue or to any disassimilative excesses or derangement resulting in ante-mortem change of the tissues, such as those occurring in virulent or infectious diseases. The body of an infant decays more rapidly that that of an adult. The course of putrefactive phenomena is also influenced by the seasons, the extent of the exposure to air, and to other mesological causes. There is a manifest difference in the special putrefactive change accordingly as a body is buried in the earth, submerged in a fluid, thrown into a cesspool, or buried in a dung-heap.

In certain cases, especially where the body has been much mutilated, it may be desirable to know whether there was *one or several murderers*. While no definite rule can be laid down on this point, we are justified in supposing that there were two or more assassins when the body of the victim shows both gunshot and knife wounds, or that two persons were concerned in the dismemberment and mutilation of a body which shows the simultaneous presence of parts skilfully cut, while others show evident awkwardness.

Where there is *more than one mortal wound* on the same dead body, a question of medico-legal significance may arise. This occurred in the Burton murder case at Newport, R. I., in 1885, which gave rise to discussion of the following abstract question: "Whether it is possible for an individual, with suicidal intent, and in quick succession, to inflict a perforating shot of the head and another of the chest implicating the heart.

Or, reversing the proposition, is it incredible that a person bent on self-destruction can, with his own hand, shoot himself in the heart and in the head?"

After consideration of the case referred to and reversal of the previous decision of the coroner, the supposed suicide proved to be a homicide. Yet if the abstract question of possibilities is alone regarded, there is no doubt of the fact that a suicide could shoot himself in such manner, both in the head and the heart, or, changing the order, of shots in the heart and in the head. The number of cases recorded establishes beyond a doubt the feasibility of the self-infliction of two such wounds, and make it clear that the theory of suicide may be maintained in such circumstances.[1]

JUDICIAL ANTHROPOMETRY.

Of late years the subject of anthropometric identification has taken such a place before justice that it cannot be ignored by the medical legist. The facts of scientific anthropology have here been applied in such a way as to establish with great certainty both the present and future identity of individuals who attempt dissimulation of their name and antecedents. The method used principally in the identification of criminals and deserters from the army has been adopted in the public service[2] and by most municipalities, with the exception of New York, where the subsequent identification of persons connected with municipal affairs has been and may be a source of no little embarrassment.

The system is based on three recognitory elements: photography, anthropometric measurements, and personal markings, from which a descriptive list is made that gives absolute certainty as to individual identity.

Owing to the illusory nature of photography and the difficulty in finding the portrait of any given individual in the large and constantly increasing collection of a "rogues' gallery," the matter has been simplified and facilitated by grouping the photographic collection according to the six anthropological

[1] See Annual of the Universal Medical Sciences, 1888, vol. v., pp. 143–147.

[2] See paragraph II., General Orders No. 33, Adjutant-General's Office, April 1st, 1889.

coefficients of sex, stature, age, and color of the eyes. Each of these primordial groups is again subdivided in such a way as to reduce the last group to a small number, when the portrait is easily found and verified on comparing the measurements of the head, of the extended arms, the length of the left foot, and that of the left middle finger.

The photographic proof for each individual consists of two portraits side by side, one of which is taken full face, the other in profile of the *right* side. On the back of the photographic card is recorded with rigorous precision all personal markings or peculiarities.

The measurements, which can be made by any person of average intelligence in three or four minutes, are extremely simple. The *right* ear is always measured, for the reason that this organ is always reproduced in the traditional photograph which represents the right face. Other special measurements are taken on the left side. The height sitting, dimensions and character of the nose, color of eyes, etc., are also noted.

It is contended that by these measurements alone the identity of an individual whose face is not even known may be established in another country by telegraph. The application of the system has proved of great service in the apprehension of deserters from the United States army (when the authorities have been able to find the card), while it is claimed to have caused the disappearance of numerous dissimulators of identity in the prisons of Paris. The police authorities of that city report that out of more than five hundred annual recognitions by the foregoing means, not one mistake has yet occurred.[1]

To avoid a *possible source of error* mensuration of the organs and the ascertainment of their form may be resorted to in the case of a cadaver that is much decayed, or in one that has been purposely mutilated or burned by the assassin in order to prevent recognition. A sufficient number of cases may be cited in which the measurement of a limb or a bone of a deceased person known to have been lame or deformed during life has resulted in the establishment of identity or the reverse.

A mistake may be prevented in the case of supposed mutilation of a drowned body, which may have been caused by the

[1] In 1892 only three failures are recorded.

screw of a passing steamer. Other errors may result from carelessness, incorrect observation of signs, and neglect to follow the ordinary precautions that should obtain in all researches on identity of the dead body.

Certain circumstances indicative of the *mental state of the culprit* may throw light on the identity. A person of unsound mind would certainly be suggested as the perpetrator of such a deed as that of the woman already mentioned, who after killing and cutting up her infant, cooked portions of the remains with cabbage and served them at a meal of which she herself partook. Equally conclusive should be the inference in the case cited by Maudsley of a person who, for no ascertainable motive, kills a little girl, mutilates her remains, and carefully records the fact in his note-book, with the remark that the body was *hot and good.*

The *handwriting* left by the assassin might also furnish a strong presumption as to the existence of a mental lesion, since the writing of the insane is often characteristic, especially in the initial stage of dementia. I recall the case of a former patient, an *aphasic*, imprisoned for having stabbed a man in the abdomen and for having wounded his wife in such a way that her arm had to be amputated. Having lost the power to express himself phonetically, this man used a book and pencil, but his writing showed a degree of *agraphia* which alone would establish his identity beyond a doubt.

While it is quite possible that dishonest transactions, and even theft, may take place by *telephone* and the voices of the perpetrators may be unmistakable between distant cities, it is more likely that the phonographic registration of speech or other sound by means of a *gramophone* should become a matter of medico-legal investigation and a possible means that may lend great assistance in establishing personal identity. Although no precedent may be cited, it is not going into the domain of theoretical hypothesis to mention a discovery of such real scientific certainty that for years after death, and thousands of miles away, gives an indefinite number of reproductions that cannot possibly be mistaken by any one familiar with the voice before it had become "Edisonized." Some gramophone disks lately shown me from Germany registered greetings and messages to relatives in Washington, who were

delighted to recognize the exact reproduction of familiar tones and accents of the Fatherland.

So limitless is the field of research in this direction that there is scarcely an anthropological, biological, or medical discovery that may not sooner or later be applied with profit in the investigations of personal identity where the combined efforts of an attorney and an expert are required.

After the most rigid and scrutinizing anatomical and material examination is made and the closest inquisition entered on, it may often be impossible to give a reasonable explanation for the cause of the physical facts observed. The medical man should remember that his is the one great exception to the rule that rigidly excludes opinions, and that scientific men called as witnesses may not give their opinion as to the general merits of the case, but only as to the facts already proved. This qualifying rule being altogether reversed in investigations into personal identity, and the physician's opinion as to identity being indispensable, it becomes a matter of most serious import that this opinion should be grounded upon absolute and well-attested facts.

MEDICO-LEGAL DETERMINATION

OF

THE TIME OF DEATH.

BY

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MEDICO-LEGAL DETERMINATION OF THE TIME OF DEATH.

SIGNS OF DEATH.

THE cessation of respiration and the absence of audible heart-beats are signs generally regarded as sufficient in themselves to determine the reality of death. But persons have been resuscitated from a state of asphyxia or have recovered from a state of catalepsy or lethargy in whom, *to all appearances*, the respiratory and circulatory processes have been arrested.

So it is advisable that we should be acquainted with some absolute tests of death which are not connected with the heart-sounds or the respiration.

It is well known that these important functions, although apparently held in abeyance, must be speedily re-established so as to be recognized, or death will rapidly follow. This condition of apparently suspended animation is seen among hibernating animals; the bear, for instance, will remain for four or five months without food or drink in a state of lethargy—the heart-action and respiration hardly appreciable. Yet it will be sufficiently rapid to sustain life during the slow metabolic processes. A number of well-authenticated cases are reported in which persons could slacken their heart-action, so that no movement of the organ could be appreciated. The case of Colonel Townsend, reported by Cheyne, is an example. He possessed the power of apparently dying, by slowing his heart so that there was no pulse or heart-action discernible. The longest period he could remain in this inanimate state was half an hour.

Instances have occurred in the new-born child where without question there have been no heart-beats or respiratory movements for a number of minutes, the limit being set at five.

These are exceptional cases. and it is setting at defiance

all physiological experience to suppose that the heart-action and respiration can be suspended entirely when once they are established, for a period as long. So, then, if no motion of the heart occurs during a period of five minutes—a period five times as great as observation warrants—death may be regarded as certain.

The respiratory movements of the chest are sometimes very difficult to observe. They can always be better appreciated if the abdomen and chest are observed together. There are two methods to determine whether respiration is absolutely suspended or not. First, by holding a mirror in front of the open mouth, observing whether any moisture collects on its surface. Second, by placing on the chest a looking-glass or basin of water, and reflecting from it an image by artificial or sun light. The slightest movement would be registered by a change in position of the image. While the writer considers the absence of heart-beats and of respiratory movement an absolute test of death, still some cases may occur in which the establishment of this test is very difficult, and the following additional tests may be employed:

1. Temperature of the body same as surrounding air.

2. Intermittent shocks of electricity at different tensions passed into various muscles, giving no indication whatever of irritability.

3. Careful movements of the joints of the extremities and of the lower jaw, showing that rigor mortis is found in several parts.

4. A bright needle plunged into the body of the biceps muscle (Cloquet's needle test) and left there, showing on withdrawal no signs of oxidation.

5. The opening of a vein, showing that the blood has undergone coagulation.

6. The subcutaneous injection of ammonia (Monte Verde's test), causing a dirty-brown stain indicative of dissolution.

7. A fillet applied to the veins of the arm (Richardson's test), causing no filling of the veins on the distal side of the fillet.

8. "Diaphanous test:" after death there is an absence of the translucence seen in living people when the hand is held before a strong light with the fingers extended and in contact.

9. "Eye test:" after death there is a loss of sensibility of the

eye to light, loss of corneal transparency, and the pupil is not responsive to mydriatics.

POST-MORTEM CHANGES.

The human body after death undergoes certain changes which will be discussed under the following heads:

1. Cooling of the body.
2. Flaccidity of the body.
3. Rigor mortis.
4. Changes in color due to
   (*a*) Cadaveric ecchymoses.
   (*b*) Putrefaction.

Cooling of the Body.

Immediately after death there is a slight rise of temperature, supposed to be due to the fact that the metabolic changes in the tissues still continue, while the blood is no longer cooled by passing through the peripheral capillaries and lungs.

The body gradually cools and reaches the temperature of the surrounding air in from fifteen to twenty hours; this is the ordinary course, but the time may be influenced by a variety of causes, such as the condition of the body at the time of death, manner of death, and circumstances under which the body has been placed.

In certain diseases, as yellow fever, rheumatism, chorea, and tetanus, the temperature of the body has been known to rise as high as 104° F. and remain so for a time. Again, it has been observed that when death has taken place suddenly, as from accident, apoplexy, or acute disease, the body retains its heat for a long time. The bodies of persons dying from hanging, electrocution, suffocation, or poisoning by carbon dioxide, do not generally cool for from twenty-four to forty-eight hours, and cases are recorded where three days have elapsed before the body was completely cold. On the other hand, bodies dead from chronic wasting diseases or severe hemorrhage cool very rapidly, even in four or five hours.

In determining the temperature of a dead body the hand is not a reliable guide: the thermometer should always be used.

Flaccidity.

The first effect of death from any cause is general relaxation of the entire muscular system. The lower jaw drops, the eyelids lose their tension, the limbs are flabby and soft, and the joints become flexible.

In from five to six hours after death, and generally while the body is in the act of cooling, the muscles of the limbs are observed to become hard and contracted, the joints stiff, and the body unyielding. Muscles which are contracted in the death-agony do not necessarily become relaxed at any time.

The muscular tissues in the dead body can be considered as passing through three stages: (1) flaccid but contractile, (2) rigid and incapable of contraction, (3) relaxed and incapable of further contractility.

Rigor Mortis.

This is sometimes called cadaveric rigidity, and occurs generally within six hours after death and disappears within sixteen to twenty-four hours. Many theories have been advanced to account for it, but the most probable one is that the rigidity is due to the coagulation of the myosin in the muscles by the weak acids which are no longer removed from the system; the muscles always give an acid reaction and are opaque instead of transparent; after putrefaction has set in ammonia is developed, the myosin dissolved, and so flaccidity results.

Rigor mortis occurs first in the muscles of the eyelid, next the muscles of the lower jaw and neck are affected, then the chest and upper extremities; afterward it gradually progresses from above downward, affecting the muscles of the abdomen and lower limbs. The rigidity disappears in the same sequence. The period after death when rigor mortis manifests itself, together with its duration, is chiefly dependent upon the previous degree of muscular exhaustion. Brown-Séquard has demonstrated that the greater the degree of muscular irritability at the time of death, the later the cadaveric rigidity sets in and the longer it lasts. He has also shown that the later putrefaction sets in, the more slowly it progresses.

The more robust the individual and the shorter the disease, the more marked and persistent is this muscular rigidity. It has been noticed that the bodies of soldiers killed in the beginning of an engagement become rigid slowly, and those killed late quickly. This explains the reason why bodies are sometimes found on the battle-field in a kneeling or sitting posture with weapons in hand.

If the rigidity of rigor mortis after it is once complete is overcome, as in bending an arm, it never returns; but if incomplete it may return. This will serve at times to distinguish real death from catalepsy and its allied conditions. While the *average* duration of rigor mortis has been given as sixteen to twenty-four hours, it must be remembered that in some cases it has been known to last only a few hours, as in death by lightning or by electrocution. In other cases it has persisted for seven and fourteen days.

This long continuance of rigor mortis has been noted in death from strychnine and other spinal poisons, in suffocation, and in poisoning by veratrum viride.

Atmospheric conditions modify to a large extent the duration of rigor mortis. Dry, cold air causes it to last for a long time, while warm, moist air shortens its duration. Also immersion in cold water brings on rigor mortis quickly and lengthens its duration.

Cadaveric Ecchymosis—Cadaveric Lividity or Hypostasis.

Within a few hours after death the skin of the body, which is of a pale, ashy-gray color, becomes covered by extensive patches of a bluish or purple color, which are most pronounced and are first seen on the back part of the trunk, head extremities, ears, face, and neck, and are due to the blood, before coagulating, settling in the most dependent parts of the body, producing a mottling of the surface with irregular livid patches. There is also a stagnation of blood in the capillary vessels, especially in those in the upper layer of the true skin or in the space between the cuticle and cutis. The discoloration continues to increase until the body is cold, when it is entirely arrested. Later on, just before putrefaction begins, the color

deepens, and the change appears to proceed from an infiltration of blood pigment into the dependent parts of the body.

At the same time the discolorations are appearing on the surface of the body, *internal hypostasis* is also taking place, most marked in the dependent portions of the brain, lungs, intestines, kidneys, and spinal cord.

This condition in the brain may be mistaken for so-called congestive apoplexy; in the lungs, for pulmonary apoplexy or the first stage of lobar pneumonia; in the intestines and spinal meninges, for the beginning of inflammatory changes.

The position of these hypostases will afford the best correction for this possible error. The appearances presented by cadaveric ecchymoses have often been mistaken for the effects of violence applied during life. Innocent persons have been accused and tried for murder or manslaughter on charges afterward proved to be groundless. Therefore it is of the utmost importance that the medical jurist should be able to distinguish between ante-mortem and post-mortem ecchymoses.

The following are the points of difference:

1. Situation. Post-mortem ecchymoses are seen on that portion of the body which has been most dependent, generally the posterior aspect, and they involve principally the superficial layers of the true skin; ante-mortem ecchymoses may occur anywhere, and generally the deeper tissues are discolored.

2. In cadaveric lividity there is no elevation of the skin and the discoloration terminates abruptly.

3. After cutting into the tissues where an ecchymosis has been produced by violence, the blood without the vessels is free in the tissue; this is not so in cadaveric ecchymosis.

4. Post-mortem ecchymoses are very extensive, ante-mortem generally limited in area.

A peculiar appearance of cadaveric lividity is observed in bodies which have been wrapped in a sheet and allowed to cool or that have cooled in their clothing. It occurs in the form of bands or stripes over the whole surface, and often gives an appearance as of a person flogged. The explanation of this appearance is that the congestion of the vessels takes place in the interstices of the folds, while the parts compressed remain whole. The unbroken condition of the cuticle, together with the other characteristics just mentioned, are sufficient to distin-

guish these ecchymoses from those produced by violence. While cadaveric lividity is seen in all bodies after death, it is especially pronounced in those persons who have died suddenly in full health or by violence, as from apoplexy, hanging, drowning, or suffocation. It is very slight in the bodies of those who have died from hemorrhage or anæmia.

The time at which cadaveric lividity appears varies greatly. Casper, who has investigated the subject thoroughly, sets the time at from twelve to fifteen hours after death.

Putrefaction.

At a period varying from a few hours to three days after death, certain changes are seen in the human body which show that putrefaction has commenced. A change of color appears first upon the middle of the abdomen and gradually spreads over the rest of the body; it is first pale green, which gradually deepens, and finally becomes purplish or brown. This change in color is due to the action on the hæmoglobin of the gases developed by decomposition. Similar discoloration makes its appearance on the chest, between the ribs, on the face, the neck, the legs, and lastly on the arms, where it is more marked along the large venous trunks, and has sometimes been mistaken for marks of violence. The eyeballs become flaccid, and if exposed to the air the conjunctiva and cornea become dry and brown. Gases are formed, not only in the hollow organs of the abdomen but also in the skin. Those developed in the cavities of the head and face force frothy, reddish fluid or mucus from the mouth and nostrils, and may cause swelling of the features and protrusion of the eyes and tongue. It must be remembered that the gases while producing distention of the abdomen may also cause changes in the position of the blood and slight displacement of the organs; they may also force undigested food into the mouth and into the larynx, and so lead to suspicion of death from suffocation.

As putrefaction advances, after a period of five or six days the entire surface of the body becomes green or brown, the cuticle becomes loose and easily detached; the tissues flaccid and often bathed in a reddish serum in such situations as the neck, the groin, and the back part of the scalp. The thorax and

abdomen become enormously distended, the features distorted and scarcely recognizable, and the hair and nails loosened. Beyond this, it is impossible to follow the changes leading to disintegration with any degree of certainty. The changes which I have just described as produced by putrefaction are the *ordinary* ones seen in a body exposed to the air at a moderate temperature, but it must be remembered that the time and rapidity of the development of these changes may be influenced by a large number of factors, and that they are of very little importance in estimating the time of death. I have seen bodies buried two months that have shown fewer of the changes produced by putrefaction than others dead but a week.

The appearance of a body buried in a coffin will be as follows after a period varying from a few months to one or two years. The soft tissues will have become dry and brown and the face and limbs covered with a soft white fungus. Hard white crystalline deposits of calcium phosphate will be found on the surface of the soft organs, and when found on the surface of the stomach care should be taken not to confound them with the effects of poison. In time the viscera become so mixed together that it is difficult to distinguish them. For the most part the changes that take place in a body buried in a coffin are similar, but much slower, to those that occur if the body is exposed to the air or buried in soil. Even under apparently identical circumstances the most varied results have been observed, so it is not possible for a medical jurist to fix a definite period of death or the time of burial from the appearance of an exhumed body. For example, Taylor records a case where after thirty-four years' interment an entire and perfect skeleton was discovered, surrounded by traces of shroud and coffin, while in an adjoining grave all that remained of a body that had been dead twenty-five years were the long bones and base of the skull. In one case a body was found well preserved after six years' burial and in another after even thirty years' interment.

This brings us next to a consideration of those factors that favor or retard decomposition.

Circumstances Favoring Putrefaction.

1. **Temperature.**—Putrefaction advances most rapidly at a temperature between 70° and 100° F. It may commence at any temperature above 50° F., but it is wholly arrested at 32° F. So one day's exposure of a body in summer may effect greater changes than one week in winter. After freezing, putrefaction takes place with unusual rapidity upon the thawing out of the body. A temperature of 212° F. stops all putrefactive changes.

2. **Moisture.**—Putrefaction takes place only in the presence of moisture. An excess of moisture, however, seems to retard the process, possibly by cutting off the excess of air. The viscera according to the amount of water they contain decompose at different times after death—for instance, the brain and eye rapidly, the bones and hair slowly.

3. **Air.**—Exposure to air favors decomposition by carrying to the body the micro-organisms which bring about putrefaction; absence of air soon arrests the changes: this is seen in bodies hermetically sealed in lead coffins, which remain unchanged for a long period of time. Moist rather than dry air favors putrefaction by lessening evaporation. Air in motion retards while still air favors the change.

It is to be remembered that a body decomposes more rapidly in air than in water or after burial. Given similar temperatures, the amount of putrefaction observed in a body dead one week and exposed to the air will about correspond to one submerged in water for two weeks or buried in a deep grave for eight weeks.

4. **Age.**—The bodies of children decompose much more rapidly than those of adults; fœtuses still more rapidly. Aged bodies decompose slowly, probably on account of a deficiency of moisture. Fat and flabby bodies decompose quickly for the same reason.

5. **Cause of Death.**—In cases of sudden death, as from accident or violence, the body decomposes more rapidly than when death results from disease. Putrefaction sets in early in death from the infectious fevers, such as typhus, pyæmia, and typhoid fever, also in death from suffocation by smoke or coal gas, by strangulation or after narcotic poisoning. Those parts

of a body which are the seat of bruises, wounds, or fractures decompose rapidly; this is especially seen in parts after a surgical operation.

6. **Manner of Burial.**—When a body is buried in low ground in a damp, swampy, clay soil, decomposition advances rapidly, as also when the grave is shallow so the body can be exposed to constant variations of temperature. A porous soil impregnated with animal and vegetable matter favors putrefaction, as also burying a body without clothes or coffin; this is especially seen where infants have been thrown into the ground and loosely covered with earth.

Circumstances Retarding Putrefaction.

1. **The Temperature.**—Below 32° F. and above 212° F. putrefaction is entirely arrested. The rapidity of the change considerably lessens as the temperature advances above 100° F. A remarkable instance of the preservative power of cold is given by Adolph Erman, who states that the body of Prince Menschikoff, a favorite of Peter the Great, exhumed after ninety-two years' burial in frozen soil, had undergone hardly any change. Buried in hot sand as is seen in the desert, a body putrefies very slowly and generally becomes mummified.

2. **Moisture.**—Absence of moisture retards decomposition. In the dry air of the desert bodies have been preserved for a long period of time.

3. **Air.**—If access of air to a body be prevented in any way by its inclosure in a coffin, by closely fitting clothes, or by complete immersion in water, putrefaction is retarded.

4. **Age.**—Adults and old people decompose more slowly than children. Males are said to change less rapidly than females, lean people than fleshy ones.

5. **Cause of Death.**—Putrefaction is delayed after death from chronic diseases unless they are associated with dropsy. Poisoning by alcohol, chloroform, strychnine, and arsenic retard putrefaction. In the latter case the putrefactive changes seem to stop after they have once commenced, and often a result very similar to mummification is seen. Death from the mineral acids, especially sulphuric, appears to delay putrefaction.

6. **Manner of Burial.**—Putrefaction is retarded by burial

a short time after death; by interment on high ground, in dry, sandy, or gravelly soil; by having the grave deep, over six feet in depth if possible; by the body being well wrapped and secured in a tight coffin, a lead one being the best in this respect. Lime or charcoal applied freely about a body will retard decomposition, as will also injection of the body through the arteries with such substances as arsenic, chloride of zinc, or antimony. The ultimate effect of putrefaction is to reduce all bodies to inorganic compounds, chiefly water, ammonia, and carbon dioxide. Three conditions are necessary for its establishment, (1) a given temperature, (2) moisture, (3) free access of air.

The order in which the various organs and tissues undergo decomposition, as given by Casper, who has investigated the subject carefully, is as follows: Trachea and larynx, brain of infants, stomach and intestines, spleen, omentum and mesentery, liver, brain of adults, heart and lungs, kidney, bladder and œsophagus, pancreas, large vessels, and last of all the uterus.

As the result of putrefaction, fluids, generally blood-stained, collect in the serous cavities of the body, and should not be confounded with serous effusions occurring during life. So also the softening of the organs and tissue resulting from decomposition should be carefully distinguished from those resulting from inflammation. These cadaveric softenings are most frequently found in the brain, spleen, and gastro-intestinal mucous membrane. Inflammatory softenings are differentiated by being rarely general but almost always limited, by the substance of the inflamed part being infiltrated with serum or pus and showing traces of vascular injection. In doubtful cases the pathologist should have recourse to the microscope.

As the result of putrefaction, various changes take place in the mucous membrane of the stomach and intestines which simulate the effects of poisons. The color of the stomach varies from red, which becomes brighter on exposure to the air, to a brown, slate, or livid purple. We can only presume that these color-changes are the result of irritant poisons when they are found in non-dependent parts and parts not in contact with organs engorged with blood, when they are seen soon after death, and when the membrane is covered with coagulated blood, mucus, or flakes of membrane.

Effects on Putrefaction of Submersion in Water.

There are certain modifications of the putrefactive changes when bodies have been submerged in water. In the first place, the changes are much less rapid; they often do not show themselves until about the twelfth day, and then as discolorations appearing generally first about the ears and temples, then on the face, from which they spread to the neck, shoulders, chest, abdomen, and finally to the legs. This is almost the inverse order of the putrefactive changes in bodies exposed to the air. As a result of the formation of gases, the body in a short time becomes buoyant; after floating on the surface of the water for a time, the gases escape and the body sinks, rising a second time when fresh gas has formed.

The rapidity of decomposition in water varies, being most rapid when the temperature is from 64° to 68° F. Stagnant as well as shallow water favors putrefaction. If a body becomes coated with mud the change is delayed. Submersion in a cesspool also retards it, and the conditions are such as to favor the formation of adipocere.

After a body has been removed from the water an exposure of a very few hours to the air causes rapid decomposition, so that in twenty-four hours more marked changes may occur than would have resulted from a fortnight's longer submersion. The face soon becomes bloated and black, so that identification is well-nigh impossible. It is quite important in medico-legal cases to estimate the time which has elapsed since death in bodies found submersed in water. The following are the various changes ordinarily seen at different periods of time, as estimated by Devergie, who has especially investigated the subject:

First Four or Five Days.—Little change: rigor mortis may persist, particularly if the water is cold.

Fourth or Fifth Day.—Skin of the ball of the thumb and little finger, also the lateral surface of the fingers, begins to whiten. This whitening gradually extends to the palms of the hands and soles of the feet. The skin of the face will appear softened and of a more faded white than the rest of the body.

Fifteenth Day.—Face slightly swollen and red; a greenish

spot begins to form on the neck and skin of the mid-sternum. The skin of the hands and feet is quite white and wrinkled. The subcutaneous cellular tissue of the thorax is reddish and the upper part of the cortical substance of the brain of a greenish tint.

At One Month.—The face is reddish-brown, the eyelids and lips green and swollen, and the neck slightly green. A greenish discoloration is also seen over the upper and middle part of the sternum. The skin is wrinkled. The hair and nails still remain intact. The scrotum and penis are distended by gas. The lungs become very emphysematous and overlap the heart.

Saponification.

When the bodies were removed from the Cimetière des Innocents in Paris, in 1786, Fourcray observed that many of them had been converted into a substance which he termed ADIPOCERE. He gave it this name because it resembles both fat (*adeps*) and wax (*cera*). Under certain circumstances which will be considered later, it is known to be a late product of the putrefactive processes. Adipocere is a substance of a cheese-like consistency, yellow or yellowish-brown in color, and composed chiefly of a mixture of the fatty acids. Chevreul has shown by analysis that it is a true ammoniacal soap, but that when formed in water impregnated with lime a calcareous may be substituted for an ammoniacal base. This may take place either in a body exposed to river-water or buried in a grave wet by water containing calcium carbonate or sulphate. Saponification can only take place when animal fat is in contact with nitrogenous matter. Neither fat nor fibrin when kept separate will saponify. Skin deprived of all its fat will not be transformed into adipocere.

Saponification commences in the fat of the female breast, of the cheeks and other parts of the body where large accumulations of fat are found, such as around the kidneys and in the omentum. As fat is distributed extensively throughout the body, nearly all parts may undergo this transformation. Taylor gives the following conditions as favorable to the change:

1. Bodies of young persons, because the fat is abundant and chiefly external.

2. Bodies of corpulent adults.

3. Exposure of bodies to the soil of water-closets.

4. The immersion of bodies in water, the change taking place more rapidly in running than in stagnant water.

5. Humid soil, especially when bodies are placed in it one upon the other. In this case the lowest of them is first changed.

When a body has been completely saponified it may remain in this state for years. In one instance, after seventeen years' burial many of the organs could still be recognized.

The time required for saponification to take place is sometimes of medico-legal importance. Three years are *usually* necessary for bodies buried in the earth. The change occurs more rapidly in water. Cases are recorded where the body of a new-born child was completely saponified in six weeks, and again, the change had commenced in a body which had been in the water about four months; but these are unusual cases.

DATA UPON WHICH OPINION AS TO TIME OF DEATH IS FORMED.

The changes which take place in a body before putrefaction sets in may enable a medical jurist to form an opinion as to the probable time which has elapsed since death; yet it must be remembered, to pronounce the time which has elapsed can only be done approximately, for very many conditions will have to be considered, which will vary in each individual case. The importance of considering the minutest detail is well illustrated by the death of Prince de Condé, Duke of Bourbon, who was found dead in his bedroom in the château of St. Cyr. When discovered at 8 o'clock in the morning the deceased was found partly undressed, hanging by his cravat to one of the window shutters. The body was cold and the lower extremities rigid. As in asphyxia from hanging the warmth of the body is usually preserved longer than under common circumstances, viz., from twelve to fifteen hours, before which period rigidity is seldom complete, the medical examiner inferred that the deceased must have died very soon after he retired to his bedroom on the previous night. As this was proven to have been 10 P.M., it followed that only ten hours had elapsed—a short time for cooling and rigidity to have taken place. It was thus rendered proba-

ble that the hanging took place soon after deceased reached his bedroom. It was alleged that the duke had been murdered, and that his body had been afterward suspended to create a suspicion of suicide. The condition of the body was, among other things, adverse to this opinion. From 10 to 12 o'clock it was proved there were numerous attendants moving about near the duke's apartments. They would have heard any unusual noise the duke must have made in resisting his assailant. But no noise was heard in the room at that or any other time, and the presumption of this being a homicide was thus strongly rebutted.

Cadaveric rigidity, while often it will aid to, is not a reliable guide. When once it is established it may remain two, three, or four days, according to the season of the year and other circumstances, and when it exists there is no rule by which it can be determined whether a body has been in this state three hours or three days.

Putrefaction, while appearing on an average, under a mean temperature, in from three to six days, is yet influenced by many circumstances. The heat and moisture of the surroundings, the age, sex, amount of flesh on the body, mode of death, position and coverings of body, all must be considered.

The temperature of the body aids us, yet the retention of warmth by the abdominal viscera may be met with in a marked degree twenty hours after death; in one case, personally known to me, the thermometer registered 76° F. seventeen hours after death.

The temperature of the body, its rigidity, and the evidences of putrefaction all furnish data from which we can estimate the *probable* time which has elapsed since death. It must be remembered that no one of them furnishes any positive proof.

Some medical jurists have attempted to give a more definite character to these changes in the recently dead body by dividing the interval between the stopping of the heart's action and the beginning of putrefaction into three periods. In the first, the warmth, pliability, and muscular irritability remain. In the second, these conditions are lost and the body is cold and rigid. In the third, the body is cold and pliant, the muscles are relaxed, and the joints are flexible, the cadaveric rigidity having entirely ceased.

There can be no doubt about the existence of these stages, but when we come to define the precise time at which one begins and the other ends, we find it impossible. For example, the first stage embraces a period which cannot be more closely defined than by stating that the person may have been dead from a few minutes to twenty hours—a statement too vague to be upheld by a counsel who defends a prisoner.

The changes which take place in these periods and the average time they last have been given as follows by Devergie:

First Period, *Few Minutes to Twenty Hours.*—Characterized by warmth of the body and general or partial relaxation of the voluntary muscles. To what portion of this period the special case belongs must be estimated according to the degree of heat in the trunk and extremities and the degree of rigidity in the muscles, the neck and the jaws commonly showing this condition first, the legs last. Warmth of the body rarely remains as long as twenty hours; in general it is sensibly cold in from ten to twelve hours. During this period the muscles are susceptible of contraction under the galvanic current, and in the early stage under the stimulus of blows.

Second Period, *Ten Hours to Three Days.*—The body is perfectly cold throughout and rigidity is well marked. The muscles no longer respond to stimuli. The duration of this period seems long, yet in one instance the body will be found cold and rigid nine hours after death. Again, cooling and rigidity may not come on for three or four days.

Third Period, *Three to Eight Days.*—The body is perfectly cold. The limbs and trunk pliant and free from cadaveric rigidity. The muscles are not capable of contracting. In summer this period is much shorter; often it will come on before three days.

Putrefaction commences when a body is kept under the most favorable conditions, in from six to twelve days, as a slight greenish discoloration of the abdomen which gradually spreads throughout the body. The time at which putrefaction shows itself and the rapidity with which it advances is dependent upon so many factors, many of which it is impossible often for the medical examiner to ascertain, that too much reliance must not be placed upon it. Casper estimates the following to be the *average* changes generally found in the periods of time given:

TWENTY-FOUR TO SEVENTY-TWO HOURS after death a slight green color is visible over the centre of the abdomen. The eyeballs are soft and yield to external pressure.

THREE TO FIVE DAYS after death the green color of the abdomen becomes intensified and general, spreading if the body be exposed to the air or buried in the ground in the following order: genitals, breast, face, neck, upper and lastly lower extremities.

EIGHT TO TEN DAYS after death the discoloration becomes more intense, the face and neck presenting a shade of reddish-green. The ramifications of the superficial veins on the neck, breast, and limbs become very apparent. Finally the patches congregate. Gases begin to be developed and distend the abdomen and hollow organs and to form under the skin in the subcutaneous and intermuscular tissue. The cornea falls in and becomes concave. The sphincter ani relaxes.

FOURTEEN TO TWENTY-ONE DAYS after death the discoloration over the whole body becomes intensely green, with brownish-red or brownish-black patches. The body is bloated and appears greatly increased in size from the development of gases within the abdomen, thorax, and scrotum, and also in the cellular tissue of the body generally. The swollen condition of the eyelids, lips, nose, and cheeks is usually of such extent as to obliterate the features and to destroy the identity of the body. The epidermis peels off in patches, while in certain parts, more particularly the feet, it will be raised in blisters filled with red or greenish liquid, the cuticle underneath frequently appearing blanched. The color of the iris is lost. The nails easily separate and the hair becomes loosened.

FOURTH TO SIXTH MONTH after death the thorax and abdomen burst and the sutures of the skull give way from the development of gases within the head. The viscera appear pulpy, or perhaps disappear, leaving the bones exposed. The bones of the extremities separate at the joints. At an advanced stage the soft parts gradually disappear.

In giving an opinion as to how long a time has elapsed since death when a body has undergone marked putrefactive changes, we must consider carefully not only the conditions of the organs, but the mode of death and the "surroundings." By these I mean the quantity of clothing worn, the depth of the

grave in which the body has been interred, the season of the year, the heat and moisture of the atmosphere. The question sometimes presents itself to the medical examiner, Of two persons found dead, which died first? The importance of this point was well illustrated in the "Lizzie Borden case." By a careful consideration of all the conditions presented by each body in the ways I have indicated, the question will not ordinarily be a difficult one to decide.

DEATH

BY HEAT AND COLD,

INCLUDING

INSOLATION IN ITS MEDICO-LEGAL ASPECTS.

BY

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DEATH BY HEAT AND COLD.

TEMPERATURE OF THE BODY.

The production and regulation of heat in the body is a problem by no means elucidated. We consider heat production to be of internal origin, by a complex process involving tissue metamorphosis, chemical changes in nutrient elements, muscular movements, etc. Heat regulation is accomplished, not only by variation in the loss of heat by the body, but by what is more important, variations in the amount of heat generated. It is an accepted physiological conclusion that there exists in the body a thermotaxic nervous mechanism which controls its normal, as well as its abnormal, manifestations of heat.

The average temperature of the body in health is 37° C. (98.6° F.), in the axilla. Taken in the vagina or rectum, .9° C. (1.3° F.) higher is noted. The daily average range of variation is about 1° C. (1.8° F.).

In disease or injury considerable variations occur; very high, as well as very low, temperatures are met. In severe neuroses and some forms of malarial disease a temperature of 42.2° C. (115° F.) has been recorded, and after an injury 71° C. (122° F.).[1]

Very low temperatures are reported in several cases of acute alcoholism, accompanied by exposure to cold, where a temperature of 28.8° C. (75° F.) in the rectum was noted, recovery following.[2]

Such extreme temperatures, though authentic, are exceptional.

Very high temperatures in febrile conditions are borne because remitting; and low temperatures, subject to periods of elevation, are met in wasting and other conditions. Very high and very low temperatures are also noted, just before

[1] Reported by Teale, Lon. Clin. Society, Feb. 26th, 1875.

[2] Reineke, Brit. and For. Med. and Surg. Rev., April, 1876.

death, in acute diseases and conditions specially involving the nervous system.

The degree to which the temperature may be raised without destroying life has been investigated by Berger, Bernard, Chossat, and others.[1]

Their experiments show that if an elevation of temperature of the body 7.20° C. (13° F.) be maintained for any length of time in warm-blooded animals, death ensues. Depression of the temperature of warm-blooded animals 12° C. (20° F.), or even less than these degrees below the normal, results fatally. Portions of the body may be frozen and yet, under appropriate treatment, recover. But freezing of the whole body must necessarily prove fatal.

Great differences in ability to endure extremes of heat and cold appear among different nations and in different individuals. The very young and the very old are unable to bear exposure to extreme cold. In both, the capacity for heat production is low and the vital powers are soon enfeebled to a critical degree. The healthy adult can, with proper precautions, safely endure great extremes of heat and cold. The experience of arctic explorers in the expeditions of Kane, Nares, Greely, and others has demonstrated the power of endurance, for a considerable period, of a temperature from 90° to 100° F. below the freezing-point. On the other hand, laborers employed in pottery and other establishments, using ovens raised to 148° to 315° C. (300° to 600° F.) or higher, are often exposed for some time without injury to temperatures approaching these intense figures.

EFFECTS OF EXTREME COLD.

Legal inquiry into the conditions of death from cold occurs almost entirely in cases of unintentional exposure. Cold has been employed, however, with homicidal intent. The depressing influence of continued low temperatures is observed in the death-rates of cities, in winters of protracted severity, where the proportionate mortality among infants, the aged and enfeebled shows marked increase. While age is a prominent predisposing and contributing factor, other causes exist. Ex-

[1] "Experiences sur les effets de chaleur, etc.," Jour. de Physique, lxiii., p. 77. Paris, 1805.

haustion from severe and prolonged exertion, deprivation of food, intoxication, former illness, and other conditions of depression lessen the powers of the body to resist cold. Thus an exposure which might be safely borne in perfect health might result fatally in the same person in conditions of depression just referred to (Case 1).

Investigation may be demanded in case of the death of

A. Young children.

B. The injured.

C. The insane.

A. In Young Children.—This may be in the new-born or older children.

In the *new-born* exposure to cold soon causes death, as warmth is essential to the life of the young being. The length of time necessary to a fatal issue is modified by several conditions. In the immature or prematurely born infant the resisting power is much less than in the child born at full term and otherwise healthy. In cases of suspected infanticide by exposure the question of the maturity of the child at birth is to be decided. Careful examination of the place in which the body was discovered should be made as to its lack of warmth; and the degree of external cold at the time of probable exposure should be recorded. The circumstances as to whether the exposure was inadvertent or accidental, as in cases of premature or unexpected delivery, or whether from intentional and deliberate purpose or from culpable neglect, should be carefully considered. The post-mortem examination should decide whether the appearances and conditions of the body are those peculiar to death from cold (Case 2).

Death may occur from culpably careless exposure to cold, as a contributory if not as a direct cause, in such conditions of enfeeblement. Criminal neglect to provide medical attendance, food, and other essentials has been proven in some cases of the so-called "faith cure" or "prayer cure." Exposure may be resorted to with deliberate homicidal intent. It may, in some cases of death, become an important legal question to decide whether a studied and persistent neglect of this nature may not have been followed, with the purpose of getting rid of a troublesome care (Cases 2 and 3).

B. Exposure of the injured or wounded, thereby in-

ducing some grave condition or complication which under proper care would have been avoided, may raise an important question in injuries inflicted by another, with or without criminal intent. It is undeniable that serious or fatal results may follow a slight wound, otherwise trivial, where the injured person was subjected, accidentally or intentionally, to extreme cold for a considerable period. While such cases are comparatively rare, they may demand investigation.

C. Exposure of the Insane.—While it must be admitted that the insane subject is usually indifferent to matters of temperature, death from exposure to cold may call for special examination. Carelessness, incompetence, or wilful neglect on the part of nurses or keepers of insane hospitals, or deliberate criminal intent in such or others having the care of or an interest in the death of an insane person may lead to a judicial inquiry.

Sudden death has been reported as occurring, in several cases, *after the ingestion of large quantities of cold water* when the person was greatly heated. It is somewhat difficult to explain all such cases reported on a single line of causation. Some observers have attributed death to syncope or asthenia by the shock produced, in the sudden effect of the cold upon the sympathetic nervous system inducing heart failure. This seems the most natural explanation.

Others consider the causative factor to be the formation of thromboses in the capillaries of the brain, lungs, and other organs, inducing active and obstructive congestions causing death by apnœa or coma. Others regard these cases as similar to "heat apoplexy."

Symptoms.

Under the influence of external cold, the vessels of the skin are contracted and the internal splanchnic areas dilated. Thus the surface of the body contains less blood and the internal organs a larger proportion. This vascular change is one of the important factors in maintaining the uniform temperature of the body. The thermometer, placed in the mouth, in such conditions frequently indicates a rise of temperature. This is probably due, not only to the increased volume of blood collected

in the internal organs, but also to an increased production of heat through a thermogenic action.

In exposure for a time to severe cold the nose, ears, cheeks, hands, feet, and other portions of the body, after the first appearance of dusky lividity, become bloodless and white, lose sensation, and become congealed; a condition known as "frost-bite." From this, recovery without injury is possible under appropriate treatment, by which the temperature is gradually raised and the circulation restored. Where the latter result is not secured, the part becomes gangrenous and is ultimately removed by a process of inflammation and sloughing.

If the application of cold be protracted and the temperature extreme, the loss of heat becomes rapid and symptoms of depression of the heart's action appear. Painful sensations of the surface and other portions of the body are experienced, succeeded by impaired sensation and anæsthesia. The skin acquires a dusky, reddish, and livid appearance, with the formation occasionally of vesicles or blisters. With the lessened sensation stiffness of the limbs appears, due to failing muscular contractility. The congestion of the central portions of the nervous system induces a condition of advancing stupor, resulting in complete coma with ultimate suspension of respiration and the heart's action.

Death from exposure to cold may be rapid or slow. In cases of recovery the period of reaction is a critical one. The depression of the heart is apt to continue, and gangrene of parts of the body is likely to occur. Ulcers and sores healing with difficulty develop in some cases.

Treatment.

In the treatment of those who are suffering from the effects of extreme cold, the restoration of the congealed or "frost-bitten" portions of the body should be gradually accomplished. Raising the temperature rapidly is liable to induce the death and destruction of the affected parts. Ice or snow should, at first, be rubbed upon the frozen part, to be succeeded later by cold water. The patient should be placed in a cool room and distant from the fire or source of heat. As soon as warmth begins to return the part should be enveloped in wool, cotton,

or some substance of poor conducting powers. If the whole body be chilled, frictions of the surface with stimulating lotions are of benefit, wrapping the person in woollen or fur coverings or garments afterward.

Hot coffee or alcoholic stimulants are of value as restoratives, but the latter are to be avoided during an exposure to cold.

Post-Mortem Appearances.

The appearances indicative of death from cold are sufficiently marked to enable one to decide whether exposure to cold was the chief determining cause of death, provided that a careful consideration of the circumstances of season, temperature, place, and other conditions be also had.

In the examination of a body in a case of apparent death from cold, the limbs and internal organs may be found frozen. It must be remembered that this occurs after, not before, death; and the frozen condition must not be mistaken for "rigor mortis."

In cases where a body is found, in freezing conditions of atmosphere, showing commencing putrefaction, the death must not be hastily attributed to cold, which prevents putrefaction. It is evident that if cold was the cause of death the temperature of the body had been raised since that event, or, more probably, death occurred from other causes and the body remained some time before becoming frozen.

The finding of a body in the snow or frozen in severe weather must not preclude the search for other causes of death, such as apoplexy, etc., which may have occurred anterior to the freezing.

Observers generally have agreed upon the presence of certain post-mortem conditions in cases of death from cold.

Externally.—Upon the skin are found dusky reddish patches, irregular in outline, which are in sharp contrast with the general pallor of the surface. Krajewskey,[1] Ogston,[2] Dieberg,[3] and others, in the several series of cases reported by them, all describe this condition. The skin otherwise is pale.

[1] Henke's "Zeitschrift," 1860.
[2] Brit. and For. Med.-Chir. Rev., 1855.
[3] Caspar's "Vierteljahrschrift," 1864.

INTERNALLY.—The viscera, including the brain, are congested. The heart contains a large quantity of blood in the cavities of both sides, and the large vessels leading from it are also full. The color of the blood is a bright red, resembling its arterial hue. This condition has been generally noted and described; but some excellent observers have not referred to it.

EFFECTS OF EXTREME HEAT.

The application of moderate heat to the surface of the body causes dilatation of the cutaneous capillaries. In such application the exhalant and perspiratory function of the skin is increased, by which means a rise in general body temperature is prevented. If, however, severe physical exertion accompany the exposure, a more pronounced result is induced and a depressing effect upon the nervous system becomes manifest. If the degree of heat be raised and the exertion increased and prolonged, marked depression ensues. Under circumstances of quiet and rest a high degree of temperature is borne by man without depression or discomfort, but with continued and severe muscular effort the rise in animal temperature is productive of distress and depressing conditions. In the Turkish or Russian baths, in the healthy subject, a temperature of 48.8° to 54.4° C. (120° to 130° F.) produces profuse perspiration but no depression, and a plunge in or affusion of cold water is not only borne with impunity but is acceptable. In conditions of heat accompanied by physical exhaustion, such sudden exposure to cold would prove extremely dangerous.

In the condition of rest, exposed to external heat, the tendency to elevation of body temperature arises from the external causes alone, which in no way specially modify the nutritive functions. But in the second condition the internal processes of nutrition, which have been subject to great stimulation, are suddenly embarrassed by suppression of the compensating activity of the cutaneous surface, and severe organic and nervous derangements follow.

In the summer season the temperature rises to 32.3° C. (90° F.) and even much higher in certain localities. During the prevalence of such heat, the mortality among young children, the aged and enfeebled is very marked; these two periods

of life being very susceptible to the depressing effects of heat. A high temperature is easily borne if the air be pure and the atmosphere be not saturated with moisture. Telluric electric conditions also have a modifying influence, undoubted though obscure.

In certain occupations an intensely heated atmosphere is endured with impunity for a considerable time, provided the air be maintained in a condition of purity and water be supplied to the person exposed. The stokers upon ocean steamships, where a forced draught is employed, are subjected to extreme heat, sometimes reaching 60° C. (140° F.). Resort to forced and continuous ventilation of the stoke-rooms, with short hours of duty, renders tolerance of the high temperatures possible.

SUNSTROKE.

The terms "*sunstroke*," "*insolation*," "*coup de soleil*," are applied to conditions induced, not alone by exposure to the rays of the sun, but rather by a combination of great heat with other exciting causes. They are used to designate attacks occurring in very hot weather after exposure to solar or other sources of extreme heat. The striking and usual phenomena are exhaustion, unconsciousness, stertorous respiration, and death, occurring by syncope, within a few moments or hours. In a number of cases the symptoms of cerebral apoplexy with death by coma are present.

In others, the condition seems one of complete exhaustion. The majority of cases seem to be a combination of these several conditions, with death resulting from syncope.

The ordinary phenomena of the attack are pain in the head, hurried respiration sometimes stertorous, violent beating of the heart with failing of its power, oppression within the chest and, occasionally, nausea and vomiting. The pupils are sometimes dilated and sometimes contracted, but in all cases exhibit lessened sensitiveness to light. The suddenness of the attack modifies the symptoms developed.

Pathological Conditions.

These are exhaustion with syncopic tendency and a rapid rise in the temperature of the body to a point destructive to

the activity of the nervous centres. This is accompanied by an abnormal condition of the blood, resulting from loss of its watery portions, with retention of effete products and impaired aeration. A tendency to general stasis, specially marked by congestions of the lungs and brain, is present. The change in the blood is a very important factor. In some cases, not fatal at the outset, this induces a septic condition.

The greatly elevated temperature of the body undoubtedly produces certain modifications which type it, in some respects, as a febrile disease; but this, with the septic tendency due to blood changes, is not sufficient to designate it as a purely "*thermal fever*," as some have claimed. It is something more than this.

Sunstroke occurs more commonly in tropical than temperate climates;[1] and usually in the day-time, at the period of greatest solar activity, those attacked being engaged in labor involving considerable exertion. It occasionally, though rarely, occurs at night. The military service affords abundant opportunity for observation. Here the seizures are on the march, rarely in camp. Fatigue, prolonged and extreme exertion, ill-adjusted clothing and accoutrements, with the deprivation of cool water, are fully as active factors as the heat of the sun. The death-rate ranges between forty and fifty per cent, the mild cases being excluded. Death in some cases is marked by syncope, in others by apnœa, though the majority seem to die by a combination of both, as in most cases the pulmonary congestion is more or less pronounced. Undoubtedly the character of the symptoms and mode of death are influenced, in many cases, by individual tendencies leading to apoplectic conditions or to cardiac or other complications.

Treatment.

This must be adjusted to the pathological conditions of the patient. As already indicated, two classes of cases are met: one marked by exhaustion, with tendency to death by syncope; the other, a state of or tendency to cerebral congestion or apoplectic conditions. Exactly opposite methods of treatment are

[1] Flint, "Practice of Medicine," p. 685; Aitken, "Practice of Medicine," vol. ii., p. 388.

demanded. In the first, frequency and feebleness of the heart's action, with faintness of the heart sounds and embarrassment of respiration, indicate the tendency to death by nervous exhaustion, and must be met by placing the patient in a condition of absolute rest and quiet in a cool place. Stimulants must be promptly administered, though cautiously on account of the tendency to nausea and vomiting. Hypodermic injections of alcohol or ether, or rectal enemata of turpentine, alcohol, or other stimulants, afford means of securing speedy effects when the stomach is irritable. Carbonate of ammonia and other cardiac stimulants are recommended. Depleting agents, or such as prove depressing, are to be avoided. In some cases, hypodermic injections of small doses of morphine prove beneficial. Individual cases must modify therapeutic procedures.

In the second class of cases the tendency to cerebral congestion indicates sedative and depleting procedures. Blood-letting has been recommended by some authors, if employed with extreme judgment and discrimination.[1] Cold applied to the head and also to the whole body by rubbing with ice[2] or by effusion and the wet sheet, or other means, is indicated if the temperature is high (104° to 105° F.). Active catharsis, by promptly acting purgative enemata, is also to be resorted to in most cases. The convulsions occurring in some cases are successfully modified and controlled by inhalations of small quantities of chloroform.

Post-Mortem Appearances.

These, though not clearly characteristic, are pronounced. In some cases no distinct conditions are found.[3] Local congestions are present in nearly all cases. Upon the skin are found petechial and livid spots, pallor being occasionally noted. Ecchymoses and subserous hemorrhages are also common. These conditions have been described as resembling those of spotted typhus (Levick).

Rigor mortis is marked and occurs early, putrefaction beginning soon after death. The lungs are highly congested and

[1] Flint, "Practice of Medicine," p. 685; Aitken, "Practice of Medicine," vol. ii., p. 391.

[2] Levick, Amer. Jour. Med. Sciences, Oct., 1866.

[3] Katzenbach, New York Med. Jour., vol. xvii., p. 91.

often œdematous, and effusions of serum are frequently found in the pleural cavities.[1]

The heart is usually changed in color and consistence, with the left ventricle contracted and the aorta empty, while the right ventricle and pulmonary arteries are dilated and engorged. The blood is fluid and dark.[2] The large vessels of the pia and dura are full of dark blood. Congestion of the cerebral mass is not always noted. The ventricles contain serum; and extravasations of blood into the cervical sympathetic ganglia and vagus are sometimes found. The kidneys are usually moist and œdematous; the liver and spleen congested and dry.

BURNS AND SCALDS.

For all purposes of practice it is unnecessary to draw any distinction between a burn and a scald, for in reality none exists, except as regards the nature of the causative agent. In some cases requiring investigation, this may prove to be a matter of much importance.

Definition.—A **burn** is an injury produced by the application to the body of a heated substance, flame or radiant heat.

A **scald** is an injury produced by the application of a liquid at or near its boiling-point.

Appearances as Indicating Origin.

A hot body may produce a burn of any intensity, ranging between reddening of the skin and complete charring of the tissues, according as its temperature is elevated and the period of contact prolonged: the shape of the object and its size being indicated by the form of the burn. Metallic substances heated to a temperature of 100° C. (212° F.) are capable of producing redness and vesication and other injurious effects. At this temperature the albuminous elements of the blood and other fluids undergo coagulation. Some bodies require to be heated to redness, or nearly so, in order to produce a defined burn.

Very hot and partially-fused solids cause burns of greater severity than where the heated body is of a character favoring

[1] Wood, Phil. Med. Times, Aug. 5th, 1876.

[2] Hanfield Jones, Brit. Med. Jour., July, 1870, p. 35.

prompt removal. In such cases their adhesion to the skin involves the tearing away of the superficial portions of the derma in their removal, or they by their adherence prolong the contact of the heated body, thus intensifying their destructive action.

Metals in a state of fusion produce burns which cannot be easily distinguished from those caused by solid bodies. Such burns are classed as scalds. Their effects may vary in any degree between slight redness and complete destruction of the tissues with charring. Burns caused by melted solids are less regular in form and outline than those caused by heated solids. They are usually of greater severity on account of the high temperature to which they have been raised.[1]

Boiling Water.—Scalds by boiling water may be so slight as to produce redness only, or they may be so severe as to cause marked and characteristic symptoms. Those noted in severe cases are an ashy hue of the skin, accompanied by a soaked or sodden appearance and the production of blisters. Occasionally these features are not easily distinguished from those of burns from other sources. Blackening of the skin and charring of the tissues never result from burns by boiling water. As in all burns, a large surface involved renders an early fatal issue probable. In severe cases, not necessarily fatal, gangrene of the parts injured sometimes occurs. Most of those met with are accidental, yet cases of scalding by hot water with intent to injure are not uncommon, aside from injuries and death resulting from explosion of boilers, bursting of steam-pipes, etc. Occasional instances are recorded of death of children, the insane or feeble persons by inadvertent immersion in a bath of hot water (Case 21).

Severe and fatal burns of the mouth, fauces, and larynx in young children occur from *inhaling steam* or swallowing boiling water from a teapot or kettle in an attempt to drink (Case 5).

Burns by burning oil produce effects and appearances similar to those by melted metals.

Burns by flame are specially characterized by scorching of the surface. Hairs upon the part actually burned are scorched and usually also those in the vicinity of the burned

[1] Pouillet, Comptes Rendus, 1836, p. 782.

patches. Such conditions could not result from scalds by hot water, boiling oil, or from a hot body only.

Burns by petroleum or its derivatives resemble the burns from flame, except that the injured portions of the body are not only scorched but blackened and are usually burned more severely than by flame alone, as the clothing holds the burning substance in contact with the parts. The odor of the agent is also very noticeable.

Burns by Acids and Corrosive Agents.—The injury produced by a mineral acid, the caustic alkalies, etc., has frequently been the source of judicial inquiry. "Vitriol-throwing," as it has been termed, has been and occasionally is resorted to with malicious intent to injure. No case of death resulting directly and solely from this cause is recorded, but grave injuries, involving loss of sight, etc., have resulted. A case is referred to by Taylor[1] where sulphuric acid was poured into the ear of a woman while asleep by her husband. Death ensued, after six weeks, from disease of the brain resulting indirectly from the use of the acid.

The appearances of a burn by a mineral acid are distinguished from heat burns with little difficulty. The eschar which results is not dry and leathery, as in a burn by heat, but soft and readily sloughing away. There is no redness around the site of the injury, the color of the burn being uniform, and no blisters are formed. There is no blackening of the skin and the hairs are not scorched. The color of the skin around the injured portion may afford valuable evidence of the nature of the agent employed. Nitric acid produces a yellow stain, sulphuric acid a dark brown, and chlorohydric acid a brownish-yellow stain.[2] The clothing also is capable of affording characteristic evidence by the discolorations produced; and the destructive agent employed may be determined by a chemical analysis of the fabric.[3]

It is not possible to distinguish a post-mortem from an ante-mortem burn by an acid when no vital reaction has taken place.

[1] Taylor, "Med. Jurisprudence," 8th Amer. Ed., p. 444; also the Med. Gazette, vol. xviii., p. 89.

[2] Chambert, Annales d'Hygiene, 1859.

[3] Buchner, Prager Vierteljahr., i., p. 129.

THE CLASSIFICATION OF BURNS.

A classification of burns according to the severity of the injury inflicted is the most practical course. Upon this plan, burns may be divided into four general classes:

I. Burns in which the skin or subcutaneous cellular tissues only are injured.

II. Burns which involve the muscles, nerves, and blood-vessels.

III. Burns involving the internal organs and bones.

IV. Burns in which the other three classes are variously mixed.

Class I.—The skin in cases such as may occur from a brief contact with a hot body or water near the boiling-point shows a slight redness or scorching with no enduring mark. Pain is considerable.

Class II.—In the mildest cases the cutis is destroyed in its whole thickness, and the parts injured are occupied by eschars of a yellowish-gray or brownish color. The surrounding skin is reddened, and the formation of blisters occurs either immediately or after an interval of a few hours. In these cases a shining cicatrix remains after the healing, without contraction of surrounding parts. In the severer cases the subcutaneous cellular tissue and underlying muscles and nerves are destroyed. The blackish eschars formed are insensible and separate by suppurative process, leaving a granulating surface below. Extensive redness of surrounding tissues, with more or less vesication, is usually noted. The resulting cicatrices, together with the skin and adjoining structures, are prone to contraction, resulting in considerable deformity, according to location and extent. So great is the deformity in injuries of the extremities, or even some parts of the head and trunk, that extensive surgical operations become necessary to relieve it.

Class III.—Burns of this class are so severe that an immediately fatal issue is usually the result. Such instances involve a prolonged exposure to flame or to a source of intense heat. The appearances described as belonging to the preceding class are in part found here with the addition of charring or carbonizing the parts destroyed.

EFFECTS OF BURNS.

The effects of burns may be considered as I., *Local*, and II., *Constitutional.*

Local Effects.—In different instances the effects vary in accordance with the extent and severity of the burn. Redness, blisters, destruction of the cuticle and of the subcutaneous cellular tissue, blackening of the skin, scorching of the hair, and roasting of portions of the body are met with in varying degrees. In some severe cases all these are found upon a single body. The redness produced varies in intensity and extent, according to the nature of the agent producing the burn, its form, and the length of time the part was exposed.

Very soon after the infliction of the burn a special line of redness appears between the burned parts and the uninjured skin. This *red line of demarcation* is formed by intensely injected vessels and becomes a very important medico-legal sign in some cases. The vesication may be single or multiple, consisting of one or two large and full blisters or a number of large and small ones, scattered over the portions burned, some unbroken and still holding their contents, others broken and denuded of cuticle or with breaks from which their serum has escaped upon the surrounding parts. In some cases of burning *cracks or fissures* in the skin occur, due to the effect of the heat, making it dry and brittle and causing it to rupture by the movements of the patient (Case 8). These fissures are most frequently noted in proximity to the joints.[1] They resemble wounds, and it occurs occasionally that it is important to accurately distinguish their character. In some cases the skin only is fissured; in others the subjacent tissues are also involved. This difference depends upon the depth of the burn. In the first condition the skin splits, leaving the subcutaneous fat exposed, which in some instances is partially melted by the heat and flows out over the edge of the crack upon the surrounding skin (Cases 8, 13). The blood-vessels in such cases usually are not burned and, owing to their elasticity, remain stretching across the fissure (Case 14). The smaller may be seen by careful examination with a lens: they should

[1] Tidy, "Legal Medicine," vol. ii., p. 124.

always be looked for. In the second class of injuries the vessels are involved in the burn and break with the cracking of the skin. The importance of careful observation of these fissures is emphasized in cases of apparent wounds associated with burning. It may be necessary to decide whether the wounds are the result of the action of heat as above described or were caused by some sharp instrument or weapon. Careful inspection of the edges of the wounds will show whether they are ragged, as the result of fissure, or clean-cut by some sharp instrument. The absence of evidences indicating hemorrhage upon the surrounding parts and the detection of uncut blood-vessels extending across the fissure will establish the differential diagnosis. Wounds of the above character resulting from the action of fire may exist on the same body with wounds of actual violence. It is important, therefore, in all cases to examine each wound with special care and record its position, shape, depth, and other characteristics.

Constitutional Effects.—As in all sudden and violent injuries, the effect of a severe burn upon the nervous system is very marked. This is manifest in the symptoms of "shock," with pallor and coldness of the surface of the body, a feeble pulse, chills or shivering, and a tendency to collapse. In other cases, proving immediately fatal, these symptoms are followed by obstructed respiration with death from coma succeeding. In other cases convulsions precede death, while in such as are not immediately fatal a reaction more or less imperfect ensues upon the first constitutional symptoms.

Death from cerebral congestion or effusion may result before any definite evidence of reaction appears. In some instances pulmonary congestion or œdema occurs, with or without pleural effusion, terminating in death before reaction. This period usually covers the first two days. In some cases immediate death results from the depression produced by the severity of the pain. During the subsequent two weeks a period of inflammatory reaction succeeds, when inflammations of the thoracic and abdominal viscera, with ulcerative processes in some organs, are developed and induce a fatal termination (Cases 10, 11, 16).

Causes of Death.

The causes of death are due to several conditions. This fact is explained in part by the relation which exists between the cerebro-spinal and sympathetic nervous systems, and of the nervous supply of the surface to that of the internal organs, which in cases of extensive injury proportionately modify the conditions of the visceral organs. As death in burning results from various causes, it is convenient to consider them under two classes:

1st. Those *immediately* fatal.

2d. Those fatal *after an interval.*

The FIRST DIVISION would include cases in which the deprivation of fresh air and the presence of asphyxiating products of combustion (carbon monoxide and carbon dioxide) were the immediate causes of death by *suffocation* or *asphyxia* (Cases 9, 18).

Accidents in endeavoring to escape or *injuries* by falling walls or timbers may cause death immediately, and burning the body occur subsequently.

Immediate death may result from *syncope* or *collapse* from the violence of the shock to the nervous system by the pain resulting from the burns.

The SECOND DIVISION includes those conditions where death may result early, from a series of causes less immediate than those just mentioned.

Cerebral congestion and *effusion*, resulting in death from coma, is not unusual (Case 15). In this connection Taylor[1] cites a case of alleged poisoning by opium, in the treatment of a burn, in a child dying comatose, and emphasizes the undesirability of administering opium or its preparations to children in cases of burns of any severity. The danger claimed to exist is hardly to be considered. In the case referred to, Abernethy, who was a witness in the case, ascribed death to coma induced by the effect of the burn. The powerfully depressing influence of the pain in sensitive organizations and liability to death from shock therefrom must be remembered.

Inflammatory conditions of the *respiratory tract* or organs

[1] Taylor, "Med. Jurisprudence," 8th Amer. Ed., p. 407.

are common results; *pneumonia*, *bronchitis*, and sudden congestion or œdema of the lungs are frequent (Cases 11, 15, 16).

Inflammation of the intestines, inducing *peritonitis* and *ulcerations* of the intestines with or without resulting hemorrhage, occurs as a frequent lesion (Case 10).

Gangrene or *septicæmia* causes death in other instances.

Exhaustion, from extensive and prolonged suppuration or from severe and long-continued pain and other conditions, terminates other cases (Case 12).

Legally, burns and scalds are included among injuries endangering life, but are not described as wounds. They may be considered dangerous according to the extent of surface which they cover, rather than the depth to which they involve the tissues.

The extensive injury to the sensory nerve structures and the suspension of function or destruction of a considerable portion of the perspiratory tracts render large superficial burns far more fatal than those confined to a small part of a limb, for example, which may be deeply burned. From a medico-legal point it is desirable to establish the fact of how large a surface must be injured to prove fatal. The effort to reduce the subject to a statement of an exact minimum area of square inches seems very objectionable and liable to lead to erroneous conclusions.

It is possible to make a general statement, subject to some qualifications, which may serve as a basis of conclusion, as each individual case must be considered in its own circumstances.

A burn involving two-thirds of the body may be regarded as necessarily fatal; but the injury of a much less proportion, even one-fourth of the surface, has resulted in death. The qualifications to be made in burns of less extent are pronounced. The *part affected* is of much importance. Burns of the trunk are more fatal than those of the extremities; and those of the genital organs[1] and lower part of the abdomen are especially so (Case 7).

The character of the burn, whether single and continuous or multiple and scattered over various portions of the body, is a very important modifying circumstance, involving the ques-

[1] Tidy, "Legal Medicine," vol. ii., p. 99.

tions of excessive pain and the difficulty in insuring necessary treatment for all parts injured.

The physical condition of the patient and sensitiveness of the nervous system to pain exert a powerfully determining influence. Burns in children and sensitive, nervous females are specially serious and call for an unfavorable prognosis.

The possibility of the occurrence of "Spontaneous Combustion" of the human body has long been discussed, and many theories have been advanced to explain phenomena observed. Combustion of the body without the application of flame or of fire has not been admitted as a scientific fact, though a number of cases have been popularly reported.

The possibility of an *increased combustibility* of the human body, under certain conditions, has been recently claimed and, in the existence of such conditions, that the application of flame may cause its more or less rapid combustion. Dr. A. Hava, of New Orleans, Louisiana, has maintained the existence of such a condition.[1] His experiments upon animals and two or three cases noted in human beings, apparently sustaining this position, have led him to conclude that an *increased combustibility* of the human body may and does exist as a result of a gradual, progressive and continuous accumulation of carbon monoxide, during a long period of time, and that its consequent combustion, on its exposure to flame or fire, is possible.

Treatment.

In cases of severe burns the constitutional as well as the local conditions demand attention. Locally, a great variety of applications has been employed: starch, gum, oxide of zinc, solution of caoutchou, collodion, cotton wadding, a mixture of linseed oil and lime-water on cotton or lint, and many other agents are used. The important consideration is to exclude the air from and to afford a protective covering for the injured surface. The constitutional treatment varies in different cases; but its main object is to relieve pain, induce reaction from the shock, and support the depressed nervous system.

For the first opium or its preparations in proper doses is indicated. Alcoholic stimulants in some cases are demanded

[1] Dr. A. Hava, *New Orleans Med. and Surg. Journal*, April, 1894.

in addition. After the stage of reaction has occurred the therapeutics must be governed by inflammatory conditions; or later by the exhaustion from continued pain, suppuration, etc.

Post-Mortem Appearances.

In the EXTERNAL post-mortem examination of a burned body careful note should be made of the sex, probable age, and every circumstance leading to the establishment of the identity of the individual. The parts burned should be specially examined as to their condition, whether exhibiting redness, vesication, or charring. The amount of surface covered by the burns should be computed; also the relation of the burned parts to those uninjured, whether separated by a sharply marked line of redness or merging into the sound skin without a line of demarcation. The condition of the blisters should be examined as to whether they are full or empty and their contents as to whether consisting of clear or turbid serum.

INTERNALLY.—In some cases no lesions are found on examination. These are usually cases where death occurred from shock or severe pain (Case 12). Ordinarily the mucous membrane of the respiratory tracts is congested. In some instances, however, no redness has been discernible. Where death occurred by suffocation and asphyxia, the trachea and bronchial tubes have been found to contain a dark smoky or sooty mucus[1] (Case 9).

The serous membranes of the brain, thorax, and abdomen are in many cases found reddened with effusions, more or less considerable, into the ventricles of the brain and the pleural, pericardial, and peritoneal cavities from the sudden inflow of blood from the surface, caused by the local injuries.

When the body has been badly charred or incinerated the skeleton usually remains, and it is possible to determine the age from the size and development of the bones and the sex from the shape of the bones of the pelvis. Careful search should be made for special articles of identity. False teeth,[2] a

[1] Caspar, "Forensic Medicine," vol. i., p. 314; Schjerning, Vierteljahr. für gericht. Med., xli., 1884.

[2] The "Parkman Case," Boston, 1850.

watch and chain, buttons, etc., have alone been sufficient to identify the incinerated remains (Case 23). Where the whole body and even the bones have been reduced to ashes, some portions of bone, etc., may be found on careful search. Sifting the ashes will give some pieces of bone, etc., which may be sufficient to disclose the presence of human remains[1] (Case 24). A chemical analysis of the ashes also will aid in establishing this fact. In cases where cremation of the body has been resorted to to conceal crime, the length of time necessary to entirely consume the human body may become an important question. A period of less than ten hours has been proven sufficient.[2]

Period of the Occurrence of Death.

As already indicated, death may occur from direct causes during the first forty-eight hours after the infliction of the burn, or may take place during a period extending from the second day to the fifth or even the sixth week. In the great majority of cases the fatal result occurs during the first five or six days. In some instances it may be important to establish the fact as to *how long after the infliction of the burn the person may have survived.*

Inflammation and suppuration would not ordinarily begin until about the third day, hence the existence of this condition would indicate that the person had probably lived two days or more; and the state of advancement of these processes would afford some further evidence. The existence of intestinal inflammations and ulcerations, which require some days for their appearance and development, would also give some indication of the probable time elapsing.

WAS THE BURN ANTE MORTEM OR POST MORTEM?

In describing the anatomical characters of a burn occurring during life, **vesication**, the formation of blisters, is regarded as a marked symptom.

While it is not an invariable result in a burn of the living

[1] Report of the "Druse Case," Trans. New York State Med. Society, 1887, p. 417.

[2] See the Druse Case above.

body, it is so constant as to become one of the most important factors in answering the question as to the ante- or post-mortem infliction of the burn. Where the burn has been caused by a scalding fluid, or by burning of the clothing, or the direct application of flame, blisters are more likely to occur than where contact with a highly heated body has taken place. In the formation of a blister the cuticle is raised from the derma or true skin by the effusion of a highly albuminous serum, and the surrounding skin is of a bright or coppery red color. The time of the appearance of such a blister is not fixed. It may occur almost immediately or may not do so for several hours, an interval sufficiently long for death to occur from shock. It must be remembered that a burn inflicted in a condition of great depression of the vital powers with insensibility may be followed by no vesication or redness, but upon reaction and return of sensation both redness and blisters may appear (Case 17). In the absence of blisters, therefore, it cannot be decided that for this reason the burn was post mortem. If from a blister formed on the living body the cuticle be carefully removed, the site of the blister will present an intensely reddened base. In the dead body, if the cuticle be removed, no red base appears, but the surface of the blister becomes dry and of a grayish color.

On the other hand, if the presence of blisters is noted, can it be concluded that the burn was ante mortem? While their presence affords reason for an affirmative answer, careful examination of the blisters as to their character and contents must be made in order to decide; the presence of apparent blisters is not alone sufficient (Cases 20, 18; Plate II.).

Elaborate experiments have been made in order to decide the possibility of producing blisters post mortem.

Leuret,[1] in experiments upon dropsical subjects twenty-four hours after death, shows the possibility of raising a blister post mortem, but one which can be distinguished from one of ante-mortem production, in that it contains a reddish serum very slightly albuminous. He urges extreme care in deciding this question.

Christison[2] found it impossible to produce a blister a few hours after death. In a patient unconscious from narcotic

[1] Annales d'Hygiene, 1835, ii., p. 387.

[2] Edinb. Med. and Surg. Journal, vol. xxxv., p. 320, April, 1831.

poison, heat applied four hours before death produced a blister and a red line was formed around the burns. In the burns produced half an hour after death, in the same patient, blisters formed in two places only, and these were covered by dry skin and contained air. No redness appeared around them.

Champouillon [1] agrees with Leuret in his conclusions, from experiments upon dropsical subjects.

Kosack [2] considers blisters with albuminous contents diagnostic of burns during life, but states the necessity for care in deciding in the absence of other signs of reaction.

Wright [3] was able to produce blisters three and a half hours after death containing a small quantity of pale serum. On the same body, similar experiments fifteen hours after death produced blisters containing no serum.

Caspar [4] states, as a result of experiments, that blisters may be produced by flame after death; that they result from vaporization of the fluid beneath the cuticle by the heat employed; that they are not found to contain serum and no line of redness is found at their base. The presence after death of vesications containing serum and surrounded by a reddish base is an evidence that the burn was inflicted ante mortem. He distinctly says: "It is quite impossible to confound a burn inflicted during life with one inflicted after death."

Woodman and Tidy,[5] in an extended series of experiments, conclude that while blisters can be produced post mortem, they are readily distinguished from those formed ante mortem in containing no serum; and even in dropsical subjects, where blisters containing some fluid were formed, the presence of but a mere trace of albumin was shown; and, in all, no redness about the base of the blisters was produced, nor any appearance of redness after removal of the cuticle.

Taylor [6] has never observed vesications in post-mortem experiments on infants. He cites a case of drowning where the person, "pulseless and apparently dead," was imprudently placed in a *hot* bath. Blisters containing bloody serum were formed over several portions of the body. He concludes that

[1] Ann. d'Hygiene, 1846, i., p. 320.
[2] Friedrich's Blatter f. gericht. Med., 1877, Heft iii., p. 210.
[3] "Path. Research, on Vital and Post-Mortem Burning," 1850.
[4] "Forensic Medicine," vol. iv., p. 299.
[5] "Forensic Medicine," Ed. 1877, p. 886.
[6] "Med. Jurisprudence," Amer. Ed., 1880, p. 408.

hot water on the living and recently dead body, so far as vesication is concerned, produces similar effects.

In experiments on the dead body immediately after death the writer has failed to produce any blister containing serum or fluid. The so-called blisters are produced by the rapid expansion and evaporation of the fluid beneath the cuticle over the portion to which the heat was applied, and differ distinctly from blisters caused during life, in the absence of serum or any redness of adjacent or subjacent parts (Plate II.).

Chambert[1] concludes that in living bodies and in dead bodies within twenty-four hours after death blisters can be produced, and that less heat will develop them in the living. He specially emphasizes the difference, in the albuminous character of the contents, of a blister formed ante mortem and of one formed post mortem.

Jastrowitz[2] emphasizes the difference between blisters formed during life and those occurring in œdematous conditions.

Blisters are to be distinguished from the bullæ arising from putrefaction. There is little danger of confounding such cases. In conditions of putrefaction no redness or line of demarcation exists, and the green discoloration and other conditions of the skin will suffice to establish the diagnosis.

Schjerning[3] considers blisters containing highly albuminous serum as diagnostic of burns produced during life. In some conditions of depression of nutrition blisters occasionally form, but are not liable to be confounded with those caused by burning.

Decaisne,[4] in experiments with the body of Prunier, guillotined in 1879, between four and a half and five minutes after execution, found that cauterization of various parts of the face and body was not followed by any evidence of the formation of a blister.

A second anatomical feature of much importance, even more so than vesication, is the condition of the skin to which the heat was applied. It assumes a dusky red color and a dry and parchment-like condition (Case 8). Surrounding this is an area of grayish-white skin bounded by a sharply defined

[1] Annales d'Hygiene, 1859, 2d ser., xi., 342, 379.

[2] Vierteljahr. f. gericht. Med., Bd. xxxvi., Heft i., 1880.

[3] Eulenb., Vierteljahr. f. gericht. Med., xli., 1885, xlii., 1887.

[4] Desmaze, Hist. de Méd. légale, p. 208.

and deeply injected **red line**, which in turn shades into the color of the surrounding skin. These features are more or less pronounced according to the degree of heat applied and to the length of time of contact; or, in other words, to the depth and severity of the burn (Plate I.).

MEANS OF DISTINGUISHING ANTE-MORTEM FROM POST-MORTEM BURNS.

Differentially, a distinction is to be made between the surrounding *redness* and *the line of redness*. The redness due to capillary distention is transient, disappears under pressure during life, and fades after death. The line of redness is permanent, changing but little under pressure, and remains after death. It is a vital reactionary effort, a true line of separation between living and dead tissue, formed in the same manner as the line of demarcation in sphacelus or gangrene. This line of redness, developed only during life and permanent after death, is of great significance in cases with a medico-legal bearing. It has been already stated that in persons in a condition of depressed vitality the appearance of redness and vesication is sometimes very tardy and imperfect, and that death from shock or pain may occur before their development at all. They are vital processes and require time for their appearance in proportion to the activity of the powers of reaction. Hence in cases of burning resulting fatally where vesication and redness do not appear, the circumstances must be carefully considered before deciding that the burns produced were post mortem. With these qualifications, it may be stated that the presence of the red line is almost uniform in burns inflicted during life and absent in those occurring after death.

If upon a body bearing evidences of exposure to heat there be found blisters containing highly albuminous serum, and such blisters, after the removal of the cuticle, present a bright red base surrounded by a bright and sharp line of demarcation, with redness of adjacent surface, we are justified in concluding that the burns were inflicted ante mortem or, at farthest, within a few moments of death. If, on the contrary, the red line is absent and the blisters contain a thin watery fluid, with a yellowish and dry condition of their base after removal of the

cuticle, the presumption is that the burning occurred post mortem.

Where *a number of burns* are found upon a body, the question whether they were produced simultaneously may be raised. This can be answered by examination as to their condition. If some show signs of recent infliction, while others are in conditions of suppuration or other changes which only occur after an interval, a difference of time in production would be probable. But if all present mainly the same conditions, the probability of their occurring at the same time may be concluded (Plates I. and II.).

The Condition of the Blood.—Special examination of the blood of persons dying from the effect of burns has been made by competent observers. While it is not at present possible to define an exact and constant condition, specially characteristic, some features of interest have been recently recorded.

The color of the blood has been variously reported; in some cases as being of a dark color and in others of a bright arterial hue. Death by asphyxia or suffocation, by the deprivation of oxygen, and by the products of combustion, would be accompanied by a dark or venous hue of the blood. An atmosphere containing an excess of carbon monoxide, resulting from combustion, would cause death by apnœa with an arterial hue to the blood.[1] But other influences must be considered. According to Schjerning,[2] it is difficult to deduce positive conclusions from the condition of the blood. The changes induced by the spleen and kidneys, as well as the varying intensity of the degree of heat to which the body may be subjected, tend to render positive and constant conclusions from this source difficult.

Falk[3] refers to the bright red color of the blood found in some cases, and explains this condition in part by the influence of chemical changes in the tissues surrounding the vessels.

Wertheim[4] describes certain conditions observed by him

[1] Tidy, "Legal Med.," vol. i., p. 108; also Buzzard, London Lancet, vol. i., p. 60, 1863.

[2] Eulenberg's Vierteljahr. f. ger. icht. Med., xli., p. 44 *et seq.*

[3] "Die Verbrennungen und Verbrühungen."

[4] Wien. med. Presse, 1868, pp. 309, 605.

EXPLANATION OF PLATE I.

FIGURE 1.—ANTE-MORTEM BURN.

Scald by steam from a boiler bursting, July, 1892.

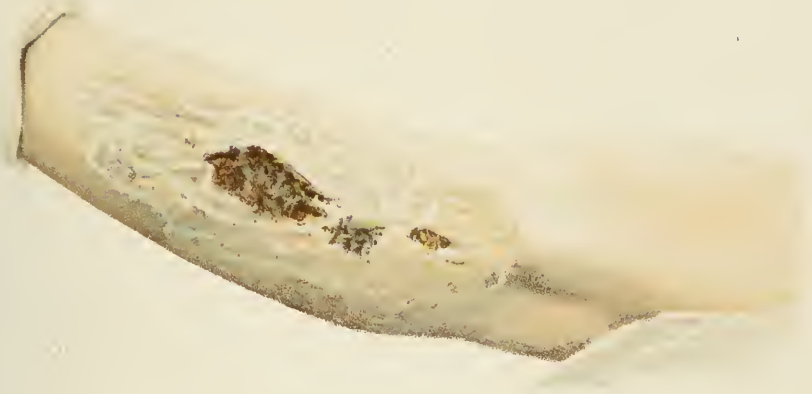
From a photograph taken sixty hours after the accident. The injury covered one-half of the surface of the body. The red line is sharply marked; the extensive blisters formed are broken and their contents have escaped; the serum drying has produced yellowish discolorations; the blush of redness on adjacent parts is well marked. Death resulted on the fifth day.

FIGURE 2.—POST-MORTEM BURN.

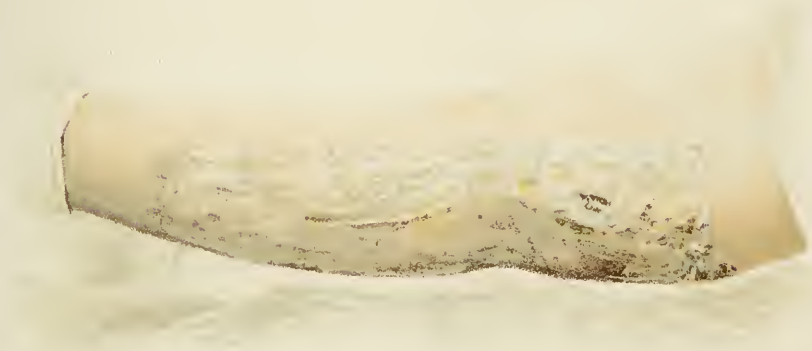
Exp. 1. (Appearances after application of a *tin can containing boiling water.*) The cuticle was raised by expansion. The blisters contained no serum and no red line is developed

FIGURE 3.—POST-MORTEM BURN.

Exp. 2. (Appearances after the application of *iron at a dull rea heat.*) No proper blister formed; the cuticle was raised, as in previous experiment. There was no serum and no red line or redness of adjacent parts. The cuticle is charred at one point, where the iron was brought into contact with it.



BURN, TWO HOURS AFTER DEATH, BY IRON AT A DULL RED HEAT.



BURN, TWO HOURS AFTER DEATH, BY TIN CAN CONTAINING BOILING WATER.

BURN BY STEAM, SIXTY HOURS AFTER INJURY.

POST-MORTEM AND ANTE-MORTEM BURNS.

Williams Litho & Pig Co New York.

and mentions an increase in the number of the leucocytes, together with the presence of hæmoglobin and melanin.

Hoppe Seyler meets with similar results and arrives at the same conclusions in his observations.

Ponfik,[1] on the contrary, is doubtful of the constant presence of some of these conditions and also of their diagnostic value.

Seliger[2] confirms the conclusions of Wertheim, in that he describes the presence of crystalline bodies and of dark discolorations (melanin).

Some spectroscopic analyses have disclosed the presence of bands additional to those of normal blood. The lack of uniformity of conditions described and of conclusions reached leaves the subject in a position of uncertainty. Examination of the blood of those dying from burns has not been so extensively and minutely followed as to enable us to decide questions which may arise in any case.

WAS DEATH ACCIDENTAL, SUICIDAL, OR HOMICIDAL?

Nearly all deaths occurring from burning are accidental, very few homicidal, and hardly more than a few exceptional cases suicidal.

It is important in cases of legal investigation to note the position of the body when found and its relation to the apparent source of fire; the parts of the body and clothing burned, etc.; evidences of violence should be carefully observed, such as contusions, fractures of bones, wounds of the soft parts, evidences of strangling, etc. (Case 22). These should be specially sought in the site of the burned portions, as burning and cremation of the victim are sometimes a resort to conceal homicide. In considering the character of the apparent wounds, it must be remembered that extensive injuries, resembling wounds, may result from the effects of fire,[3] and these must be carefully distinguished.

Inability to detect special marks of violence need not preclude the possibility of its commission and of its being a possible cause of death (Case 19). The parts burned, the character and

[1] Berliner klinische Wochenschrift, 1876, No. 17; 1877, No. 46.

[2] Eulenberg's Vierteljahr. f. gericht. Med., xlii., p. 47.

[3] See page 643 of this section.

depth of the burns, and their relation to the apparent source of burning, with consideration of their probable simultaneous exposure, are all circumstances of weight in forming an opinion. The position of the body in relation to the fire should also be considered. In accidental burning, except in cases of intoxication, epileptic seizures, or other sources of helplessness, the victim is quite likely to be found at a distance from the fire, owing to his efforts to escape.

CASES.

Case 1. *Death from Cold. Accidental* (Dr. Hilty in Caspar's *Vierteljahrschrift*, II., 1865, p. 140).—Male, æt. 52; intoxicated. Severe winter weather; death from exposure. Post mortem: Blood crimson; both sides of heart full; internal organs congested.

Case 2. *Criminal Exposure to Cold* (*Ann. d'Hygiene*, 1868, Vol. II., p. 173).—Girl, unmarried; sudden delivery when at stool. She stated that she had fainted, and found the child dead when she recovered. The child had breathed and the cord was cut. No marks of violence. Evidence of death being caused by wilful exposure. Imprisoned.

Case 3. *Ill-Treatment and Criminal Exposure* (*Ann. d'Hygiene*, Vol. VI., p. 207, 1831).—Man and wife tried for manslaughter of a child, æt. 11. Wife the stepmother. Starvation and ill-treatment by mother, followed by forcing the child, in a cold December day, to get into a barrel of cold water and remain there. Though removed by a servant, she was again placed in the cold water by the mother, death resulting. The woman was sentenced to life imprisonment.

Case 4. *Sunstroke, High Temperature, etc.* (Dr. A. Flint, Jr., *New York Med. Jour.*, 1872, p. 168; Dr. Katzenbach, *New York Med. Jour.*, 1873, p. 93).

Case 5. *Scald, Drinking from a Tea-kettle. Accidental* (Mr. Sympson, *Brit. Med. Jour.*, 1875, June 19th, p. 809).—Boy, æt. 2½ years, drank boiling water from spout of tea-kettle. Inflammation of pharynx and glottis. Tracheotomy; recovered.

Case 6. *Fatal Scald of Insane Person in a Bath* (*Brit. Med. Jour.*, April, 1871, p. 456).—An insane patient fatally scalded in a bath, through carelessness of an attendant. The charge of manslaughter brought against the attendant.

Case 7. *Fatal Burn of Genitals. Accidental* (Caspar, "Forensic Med.," Vol. I., p. 315).—Female child, 2½ years, fell on a hot flat-iron. Genitals burned; died in eleven days. Vagina gangrenous; blood fluid; lungs anæmic and pale; trachea bright red, etc.

CASE 8. *Red, Parchmenty Skin, Cracks, etc.* (Caspar, "Forensic Med.," Vol. I., p. 307).—While a chimney-sweep was cleaning a chimney a fire was lighted below. Death. The entire skin was of a coppery red color, with yellow patches. No carbonization. Skin parchmenty, with fissures upon the edges of which the fat had melted and flowed out.

CASE 9. *Asphyxia. Sooty Mucus, etc.* (Caspar, "Forensic Med.," Vol. I., p. 314).—Two children, æt. 3 and 7, burned; death from asphyxia. The youngest, the girl, burned externally; the boy was not. Post mortem in both showed the trachea to contain frothy and sooty mucus. Lungs and vessels of thorax and abdomen distended with dark and fluid blood. Brain congested, etc.

CASE 10. *Burn of Body. Inflammation of Stomach* (*Amer. Jour. Med. Sciences*, Jan., 1861, p. 137).—Superficial burn of lower part of body. Death on the thirteenth day. Post-mortem examination showed the stomach inflamed and the intestines also.

CASE 11. *Accidental Scald. Pleurisy* (Caspar, "Forensic Med.," Vol. I., p. 312).—Female child, æt. 6; scalded with a pot of boiling coffee overturned upon the side of neck, right axilla, thorax, and right arm. Death on the eighth day. Post-mortem examination revealed inflammation of right pleura, pericardial effusion, etc. Body anæmic.

CASE 12. *No Internal Lesion Found* (Guy's Hospital Reports, 1860, Vol. VI., p. 146).—Female, æt. 9. Burn of upper part of chest and arms by clothing taking fire. Death on the ninth day. Post-mortem examination revealed no lesion of the internal organs.

CASE 13. *Cracks and Fissures of Skin* (Caspar, "Forensic Med.," Vol. I., p. 314).—Male, æt. 83. Clothing caught fire; death. Body carbonized. On right side were fissures opening into the abdomen; the viscera could be seen, etc.

CASE 14. *Fissures, Vessels Crossing, etc.* (Taylor, "Med. Jurisprudence," Vol. I., p. 696).—Boy, æt. 2; death in three-quarters of an hour. On legs were fissures and lacerations near each knee. On right thigh a laceration $2\frac{3}{4}$ inches long, $\frac{1}{6}$ inch deep and $\frac{1}{4}$ inch wide; fatty tissue seen beneath. No blood effused; small vessels could be seen stretching across the fissures.

CASE 15. *Brain Congested, etc.* (Caspar, "Forensic Med.," p. 316, Vol. I.).—Boy, æt. $1\frac{1}{2}$ years, set fire to his clothing. Death in $1\frac{1}{2}$ days. Post-mortem examination showed congestion of the brain, inflammation of the trachea, engorgement of the lungs with hepatization of the lower part of the right lung.

CASE 16. *Burn of Lower Part of Body. Death* (same reference).—Woman, æt. 81; burn of lower part of body, including the gluteal region, the perineum and genital organs (external). Death after several days. Post-mortem examination showed the upper lobe of left lung in a stage of red hepatization, etc.

CASE 17. *Tardy Appearance of Redness and Vesication* (Tidy,

"Legal Med.," Vol. II., p. 124, Case 15).—Woman, insensible from cold, had hot water applied in tins to her sides and feet. The flannel coverings became displaced and the hot tins came in contact with the body. No redness or vesication could be detected two hours afterward. The next day, when consciousness had returned and recovery from insensibility had taken place, the parts had become reddened and vesicated.

Case 18. *Were the Burns Ante Mortem or Post Mortem?* (Caspar, "Forensic Med.," Vol. I., p. 317).—Woman intoxicated; clothing caught fire; death due to asphyxia. Some burns apparently caused during life and some after death. The case was decided upon the *character* of the vesications and their *contents*. Lungs and other organs normal. Right side of heart engorged with dark blood.

Case 19. *Murder. Body Burned* (Dr. Duncan, *Med. Gazette*, Lond., Vol. VIII., p. 170).—Man charged with the murder of his wife and attempting to burn the body afterward. The body was so extensively burned as to remove all means of deciding the cause of death. The man claimed that her clothing took fire when she was intoxicated. Persons in the same house had heard sounds of a struggle before smelling smoke and fire. Furniture was not burned, nor the house. The prisoner was found guilty of murder.

Case 20. *Blisters. Was the Scalding Ante Mortem?* (Taylor, "Med. Jurisprudence," 8th Am. Ed., p. 411).—The body of an infant found in a saucepan, boiled. The prisoner admitted that the child had breathed. The boiling water had destroyed the means of positively deciding whether the child had breathed. Blisters found upon it contained yellow serum. Was the child living when put in the water? The prisoner was acquitted.

Case 21. *Scald of a Lunatic in a Bath* (Taylor, "Med. Jurisprudence," 8th Am. Ed., p. 411).—Insane patient placed in a hot bath. Temperature 123° F. Death in collapse next day (1879).

Case 22. *Criminal Burning, Strangling* (Report of Profs. Liebig and Bischoff, of Giessen, March, 1850).—The man Stauff was tried at Darmstadt for the murder of the Countess of Goerlitz, whom he had attacked and murdered in her chamber, and then fired the furniture in order to conceal the crime. It was uncertain whether she had died from injury to the head or from strangulation. The tongue protruded and was swollen, as in cases of strangling, and maintained this condition. He was convicted chiefly on circumstantial evidence. After conviction he confessed that he had strangled her and then set fire to the furniture, which he had piled up about her.

Case 23. *Murder. Body Burned. Identified* ("Report of the Trial of Prof. Webster," etc., Boston, 1850).—Prof. Webster killed Dr. Parkman and then burned the body, in portions, in a furnace in his laboratory. Search among the cinders of the furnace disclosed

pieces of human bones and a set of false teeth which the dentist who made them recognized as made by him for Dr. Parkman, etc.

Case 24. *Murder. Body Entirely Burned. Identified* (the "Druse Case," Trans. New York State Med. Soc., 1887, p. 417).—Mrs. Druse, with the compulsory aid of her children, killed her husband with an axe. The body was burned in a wood stove, with pine shingles. The ashes were thrown into a swamp near by. They were found and carefully sifted. Pieces of bone of various sizes, identified as human, were found, as also a few porcelain buttons, etc. A few hairs found, with stains, completed the identity. Experiments in this case showed that the body could have been consumed within *ten* hours. The prisoner was convicted of murder.

DEATH FROM STARVATION.

IN ITS MEDICO-LEGAL ASPECT.

BY

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STARVATION.

GENERAL CONSIDERATIONS.

PHYSIOLOGY teaches that life can only be maintained in the living organism by a constant equilibrium between its waste and repair. **Nutrition** is a term by which we describe this double movement of renewal of the molecular structure of the body, and in this general sense only, that nutrition is synonymous with the maintenance of the organism in a stable condition, is it employed here.

This condition of equilibrium is maintained by a regular and constant supply of *food.*

A food may be defined to be a substance which, after introduction into the body, supplies material for the renewal of its tissues or sustains some of its vital processes. Foods vary greatly in their properties as restorative or constructive agencies, some containing but few essential properties, while others combine almost all of the elements required. As some foods contribute elements for tissue restoration, others are specially concerned in the calorifacient activities of the organism,[1] while others are marked in their tendency to take part, almost exclusively, in special chemical processes.[2]

The various articles used as foods contain nutritive elements combined with innutritious substances. They have been variously classified, but are conveniently divided into

I. Organic foods, { *a.* Nitrogenous (C.H.O.N.). / *b.* Non-nitrogenous (C.H.O.), { Oleaginous / Carbohydrates.

II. Inorganic foods, { *a.* Water, H_2O. / *b.* Saline substances.

Nitrogen enters largely into the composition of the body, and hence must be abundantly supplied and in combination.

[1] Flint's "Text-Book of Physiology," Ed. 1877, p. 517; I. Forster, "Zeitschrift für Biologie," tome ix., 1872.

[2] Foster, "Handbook of Physiology," Ed. 1880, p. 457; Kirke's "Handbook of Physiology," 11th Ed., vol. i., p. 311.

Of the non-nitrogenous elements the most important are *fat*, *sugar*, and *starch*.

The *inorganic* principles are essential to the process of nutrition. *Water*, constituting 87 per cent of the bulk of the body, is demanded in constant supply; while the *saline substances* are necessary for the perfect performance of many of its chemical processes.

It is apparent that no single element can alone carry on the nutrition of the body, and hence *variety* in the supply of food, as well as sufficiency in its quantity, is essential to normal nutrition. Nor are these the only factors in this complex problem. Proper preparation of food, its supply at necessary temperatures,[1] and other requirements enter into the question of normal or sufficient alimentation.[2]

Alimentation is sufficient when it is so regulated that all the functions of the body are performed in a complete and regular manner. Insufficient alimentation induces a series of phenomena and a result which have been designated "*inanition*," or "starvation."

The exact amount of aliment required by each individual can only be stated in a general way. In the circumstances in which he is placed, the supply must be of such character and quantity as shall be proportionate to the constructive and reparative needs of his body. It is possible, however, to state a mean for the various ages and occupations of life.

Physiologists generally agree that in ordinary conditions of exercise the following represents the amounts of the several food elements necessary for the adult individual daily:

Albuminous substances.....	120 gms.	= 4 oz.
Fatty substances.....	60 "	= 2 "
Carbohydrates.....	360 "	=12 "

Taking the fatty matters as the unit, the daily allowance would bear the following proportions:

Fats, 1; albuminoids, 2; carbohydrates, 6.

These quantities and especially the fats and carbohydrates, in conditions of hard muscular labor, must be increased; and the proportion would then stand:

[1] F. Spaeth, "Archiv für Hygiene," 1886, pp. 68–81.

[2] Rochard, "Encyclopæd. d'Hygiene," vol. ii., p. 796.

Fats, 1; albuminoids, 1.7; carbohydrates, 7.

The division of this amount of food elements into proper portions during twenty-four hours is important. This must be regulated by the habits and other circumstances of the individual.[1]

The occurrence of death solely from privation of food is comparatively rare; yet it is sufficiently frequent to be considered as one of the causes of violent death and to demand investigation, since circumstances may be such as to constitute a homicide from criminal neglect or a suicide from intentional abstinence from food.

"**Starvation,**" or "**inanition,**" may be considered as being *acute* or *chronic* according as the requisite food has been suddenly and completely or gradually withheld.

ACUTE STARVATION.

The complete deprivation of food induces a series of modifications of the functions of the body, differing somewhat from those developed by a partial and prolonged deprivation. The length of time during which complete absence of food can be endured varies with circumstances. In absolute stoppage of the food supply the acute sensations of hunger pass away after the first one or two days, and are succeeded by profound functional disturbances with weakness and depressing sensations over the epigastric region, accompanied by distressing thirst.[2] The mouth is dry and the tongue heavily coated; the breath is fetid; the skin is harsh, dry, and exhales a disagreeable odor; the feces become more and more scanty until the latter days of life, when diarrhœa usually supervenes; the face and extremities become rapidly emaciated; the person walks with a weak and tottering gait;[3] the urine is small in quantity and very acid; muscular feebleness gradually reaches complete inability to move; ringing in the ears, insomnia and, in some cases, hal-

[1] For elaborate statements consult Edward Smith, "Foods," Int. Sci. Ser., N. Y. Ed., 1878; Pavy, "On Food," 2d Ed., 1881, N. Y., p. 467; Buck, "Hygiene," Ed. 1879, vol. i., p. 190; Parkes, "Hygiene," Ed. 1873, p. 179; Levy, "Traïté de Hygiene," vol. i., p. 739.

[2] Corrigan, "On Famine and Fever," etc., Dublin, 1849.

[3] Donnivan, "On Famine," Dublin Med. Press, 1848, p. 67.

lucinations[1] with delirium and convulsions precede death, though these latter symptoms are not uniformly observed.[2]

"CHRONIC STARVATION," "CHRONIC INANITION."

This form of starvation, met with most extensively during the prevalence of famine, also occurs in conditions demanding legal investigation.

The symptoms are sufficiently constant and characteristic. Emaciation becomes extreme, the skin dry and rough, exhaling a disagreeable odor and often covered with a coating not entirely attributable to filth; the breath is fetid and offensive. With some exceptions, the victim retains his consciousness and ability to move about, muscular efforts becoming more and more feeble; the voice becomes faint; the evacuations infrequent, dry and dark; the urine scanty and high-colored, death occurring suddenly at the end, with delirium in some cases.

The length of time during which these symptoms are developed and their intensity depend mainly upon the amount and character of the aliment actually supplied during the period before death.

Upon the PULSE and CIRCULATION the effects of starvation are manifest in increased frequency and feebleness of the cardiac contractions and lessened force of the cardiac impulse; this is more and more marked as the anæmic condition becomes profound. In some cases the pulse is greatly reduced in frequency, as well as in force, dropping as low as thirty-seven beats in the minute,[3] and auscultation reveals the existence of cardiac bruits.

In connection with enfeeblement of the circulation, a tendency to hemorrhagic conditions is common, with purpuric and petechial eruptions in some cases.

TEMPERATURE.—A subnormal temperature is frequently noted in the progress of chronic wasting disease. In inanition, which in some respects induces a similarly profound disturbance of the functions of nutrition, an analogous lowering of the

[1] Folet, Ann. de Hygiene et de Méd. Legal, 2d ser., vol. xlviii.

[2] Sloan, London Med. Gazette, vol. xvii., p. 265; Martin, Med. Times and Gazette, 1861, vol. i., p. 344.

[3] Chossat, "Récherches experimentales sur inanition," Paris, 1843, p. 45.

body temperature occurs. Chossat clearly shows in his experiments the influence of starvation in depressing the body temperature. This abasement of temperature does not remain constant, but daily oscillations appear, differing from those occurring in conditions of normal alimentation.

While the normal diurnal variation in the fully nourished is about 0.3° to 1.0° C. (0.5° to 1.7° F.), in the starving this variation reaches 3.28° C. (5.4° F.). This rises to nearly double this amount during the latter days of life, and is greatly increased above this figure during the day preceding death. The temperature at the close falls to a mean of 24.9° C. (76° F.), and at the moment of death has been noted at 18.5° C. (66° F.).

Emaciation.—Loss of weight is the most striking and constant symptom of starvation. The rapidity of its production and its extent are modified by circumstances. A very considerable loss of weight can be sustained by the ordinary individual without a fatal result.

Chossat[1] fully demonstrated the effects of inanition upon the various functions and organs of the body in animals, and has drawn the conclusion that a loss of weight exceeding four-tenths of the entire weight of the body is productive of a fatal result. These deductions may be adopted as applicable to the human species. This statement must be accepted as a mean, as it is capable of variation by circumstances, such as age, obesity, etc.

Death may occur before so great a loss has been reached in some cases, and in the obese the fat may disappear entirely and cause a loss reaching five per cent of the entire weight of the body, in a very fat animal, without a fatal result.

Bouchardat[2] considers that the important question is the extent to which the blood and organs of the body contribute to this loss of weight. Impoverishment of the blood by inanition, which at the time of death has been found to amount to six-tenths of its solid constituents, is one of the most vitally serious elements of this loss; and a relative increase of its watery portion appears, without regard to the employment of water as a beverage.

[1] "Récherches experimentales sur inanition," 1845.

[2] Bouchardat, "De l'Alimentation insuffisant," Paris, 1852, p. 10.

It must be remembered that in wasting diseases extreme emaciation may occur under a liberal diet, and may continue for a considerable time before death.[1]

The muscular system becomes greatly enfeebled, atrophied, and unable to perform its functions; the loss sustained by the muscles least used being most marked. The extent of muscular power possible in starvation varies in different individuals and in various circumstances.

The vigorous and healthy adult, as a rule, retains muscular power to a greater extent and for a longer period than the child or aged person, under similar circumstances.

Exposure to a rigorous climate, prolonged fatigue, etc., rapidly reduce capacity for muscular effort in conditions of inanition.

The Period at which Death Occurs.

This is influenced by many circumstances. It is difficult to fix an exact period for the duration of life in complete deprivation of food, or acute starvation, and it is certainly more so in chronic inanition, when the modifying circumstances are increased in number and complexity.

A large number of cases of prolongation of life during a period of absolute deprivation of food which has been stated to extend over weeks and even months, cannot be accepted as free from error, and hence are not considered here.

A sufficient number, accurately observed and well attested by unimpeachable authorities, have led to the conclusion that the healthy adult, in a total deprivation of food, can exist for a period not exceeding ten to twelve days. On one of the Inman line of steamers, a young man, aged twenty years, endured absolute deprivation of all food and water during eleven days, recovery following.[2]

Sarah Jacobs, a child of thirteen years ("the Welsh fasting girl"), had been exhibited by her parents as a miraculous being under the pretence that she had eaten nothing during *two years*.

The child being placed under complete surveillance by four

[1] Greenfield, Brit. Med. Jour., Oct. 20th, 1877.

[2] Dr. McLoughlin, London Lancet, Nov. 2d, 1878.

nurses from Guy's Hospital for eight days, during which period no food was taken, died on the ninth day.

The post-mortem examination showed all organs of the body to be in a healthy condition. The stomach was empty, with the exception of three teaspoonfuls of a thin acid fluid. The intestines were also empty and their walls were not thinned. A layer of fat, half an inch or more in thickness, was found under the skin of the chest and abdomen. The liver was in a healthy condition, as also the kidneys and spleen. The bladder was empty.

The parents were tried on a charge of manslaughter and were convicted of causing death by criminal negligence.[1]

Caspar gives the details of a case observed by him of a man aged thirty-six years, who endured total abstinence from all food for eleven days, recovery following.[2]

Cases are reported of miners who have been imprisoned by accidents in mines for eight, nine, and nine and one-half days, with recovery following rescue at the end of this time.[3]

While the period stated may serve as a maximum limit to which life may be extended in acute starvation, there are circumstances which must be considered as modifying this.

Body Condition.—It need hardly be stated that the individual in perfect health can sustain complete inanition longer than the enfeebled or diseased. The presence or absence of *fat* modifies considerably the power of endurance.

Age.—Infants bear starvation badly and succumb more quickly than the adult. The aged, while they bear a moderate amount of food better than the young adult, do not endure a complete deprivation for so long a time.

Cold.—The depressing influence of cold upon the vital functions, especially in the young and feeble, renders it a powerful factor in shortening the duration of life in starvation.

The Supply of Water.—When all food is withheld, free use of water as a drink tends to increase the length of the interval before death. In several cases of protracted fasting, the use of water in moderate amount has been resorted to with

[1] Reg. *v.* Jacobs and wife, Carmarthen Summer Assizes, 1890; also London Lancet, 1890, vol. ii., p. 132.

[2] Caspar, "Forensic Medicine," Syd. Soc. Pub., vol. ii., p. 29; London Lancet, April 11th, 1877, pp. 580–620.

[3] Thornhill, Med. Gazette, Nov. 28th, 1835, p. 390.

the apparent result of amelioration of some of the distressing symptoms and lengthening the period of endurance.

Dr. Tanner, a physician, attempted in July and August, 1880, at New York, a complete fast of forty days' duration, with the exception of the free use of water. In this case absolute abstinence from all nourishment is questioned, as no strict medical surveillance was maintained.

The Italian Succi, at New York, in 1890, undertook a voluntary abstinence from food for forty days, under surveillance, with the use of simple liquids and of some narcotic substance. He completed the fast, but beyond this fact the case is without scientific value.

Catalepsy.—Certain abnormal conditions of the nervous system are met where the activity of the vital functions is very considerably lowered and the various processes of the economy are in a condition of semi-suspension. Cases of this character have been observed where the supply of food has been almost entirely suspended for a period of several days, with but little emaciation and other symptoms characteristic of inanition.

WAS STARVATION ACCOMPANIED BY OTHER ILL TREATMENT?

This question may arise where evidences of starvation are apparent.

Such cases are met among young children neglected or abused by parents or those in whose care they may have been placed, or among the alienated or sick in the care of cruel or unsympathetic attendants.

Infants placed with "wet-nurses" or found in the so-called "baby farms" also furnish cases which fall under this head.

A careful examination into the collateral circumstances of the case, together with the results of a careful post-mortem examination, usually render a positive answer to this question possible.

POST-MORTEM EXAMINATION.

The dead body exhibits appearances quite characteristic.

Emaciation is very marked and sometimes reaches an extraordinary degree, surpassing that of prolonged and wasting diseases.

In extreme cases the fat entirely disappears throughout the body; the omentum and mesentery are entirely devoid of it, as well as the subcutaneous and intermuscular cellular tissue. The muscles are atrophied and the *heart* is sometimes considerably reduced in size; the liver and kidneys in some cases show great reduction of volume. The spleen also is small and often softened.

The **stomach** and **intestines** usually display an extensive thinning of their walls, so much so that their contents may be distinguished through them; their calibre also is frequently found to be diminished, though occasionally they may be distended with gas. Usually they are empty, or contain only a small quantity of bile and fecal matter. In some cases various foreign substances which have been swallowed by the victims to appease hunger have been found in them.

The thinning of the walls, so constantly noted, has been considered as a specially characteristic symptom of starvation.[1]

The congestion, softening, and ulcerations which have been observed in some cases cannot be considered as evidences of starvation or as its results, but rather as being due to an enteritis induced by the ingestion of improper substances.

The **gall bladder** is usually found filled with dark and inspissated bile. In death by starvation the entire organs of the body exhibit no specific form of disease. Evidences of the existence of an organic affection observed in the post-mortem examination at once raise the question:

WAS DEATH CAUSED BY STARVATION OR DISEASE?

Was the original disease aggravated by a failure to supply the patient with food, or are the lesions observed the result of starvation? A positive conclusion can be reached in such cases by carefully considering the results of a post-mortem examination together with other facts elicited by the inquiry.

Harriet Staunton,[2] a young girl, had been kept in close confinement by four interested persons, and removed in great

[1] Caspar, "Forensic Medicine," Syd. Soc. Pub., vol. ii., p. 36; Martin, Med. Times and Gazette, March 30th, 1861 (Case 132).

[2] "The Penge Case;" Reg. *v.* Staunton, Central Crim. Court, 1877.

haste, when in a condition of extreme prostration, to Penge, where she died, on the day succeeding her removal, in a state of extreme exhaustion and emaciation. Fat was absent from every part of the body; the stomach and intestines were empty, contracted, and their walls were greatly thinned.

A small deposit of tubercle was found at the summit of the left lung and a recent deposit of miliary tubercle beneath the arachnoid, upon the surface of one of the cerebral hemispheres. No other tuberculous deposits were found. The opinion given by the physicians making the post-mortem examination was that death resulted from starvation. This opinion was shared by Professor Virchow, of Berlin, who stated that the tuberculous deposits found could not explain the cause of death.

In this case the extreme emaciation, entire absence of fat, thinning of the intestinal walls, etc., were the determining conditions. While extreme emaciation alone is not sufficient to decide the case to be one of starvation, its existence, taken in connection with some of the conditions found constantly in persons known to have died of starvation, is a strongly corroborative fact. Nor can its absence be taken as conclusive evidence that death occurred from other cause than starvation, since in some cases of death from inanition emaciation has not been extreme and in a few cases not at all marked.[1] Instances of this character are reported by Taylor and others.

DISEASES PRODUCED BY STARVATION.

The effect of insufficient alimentation in the production of disease has long been recognized. It is understood that this result follows the deficiency in either quality or quantity. The so-called "famine fever," prevalent in times of dearth, has afforded extensive opportunity for observation of the effects produced. The symptoms developed are those directly referable to impoverishment of the blood. Pallor, emaciation, nervous depression, derangement of the digestive organs, and muscular enfeeblement appear in every case.

The development of strumous, herpetic, and cutaneous diseases generally is marked.

Of the secondary effects, the cachectic condition induced ex-

[1] The case of Reg. *v.* Jacobs and wife.

presses itself in pulmonary phthisis largely, while in infants and very young children intestinal disorders are specially frequent. Organic diseases already existing are seriously aggravated; wounds fail to heal, become ulcerative and sometimes gangrenous; while all degenerative processes are rapidly hastened to a fatal issue.[1]

[1] Holland, "On Morbid Effects of Deficiency of Food," London, 1839.

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